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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GERALD I. MOBLEY,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR WRIT OF CERTIORARI

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August 1992

QUESTIONS PRESENTED

Whether the Court of Military Appeals erred in concluding that the improper closing argument of the trial counsel which invited the member's attention to the fact that appellant did not testify, expressed counsel's personal belief that appellant was guilty and commented on the failure of the defense to call various witnesses was harmless error.

Whether the Court of Military Appeals erred in concluding that the military judge did not commit prejudicial error by admitting evidence taken from the crime scene which the defense was never able to examine or review as a result of the government's arbitrary and unreasonable decision to release the car and its contents to Mr. Torres on 25 February 1987.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Gerald I. Mobley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on May 15, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 31 M.J. 273 (C.M.A. 1990) (Appendix C). The first opinion of the United States Air Force Court of Military Review, issued on is reported at 28 M.J. 1024 (A.F.C.M.R. 1989) (Appendix D). The opinion of the Air Force Court of Military Review on remand is reported at 34 M.J. 527 (A.F.C.M.R. 1991) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on May 15, 1992. (Appendix A). The jurisdiction of this Court is invoked under 28

U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

On various dates during August and September 1987, appellant was tried by general court-martial consisting of officer members at Bergstrom Air Force Base, Texas. Contrary to his pleas, appellant was found guilty of attempted rape in violation of Article 80, Uniform Code of Military Justice [hereinafter cited as U.C.M.J.], and of premeditated and felony murder in violation of Article 118, U.C.M.J. He was sentenced to a dishonorable discharge, confinement for the rest of his natural life, forfeiture of all pay and allowances and reduction to pay grade E-1. The sentence was approved by the convening authority except for the forfeitures which were reduced to forfeiture of $300.00 pay per month for sixteen months.

On 18 July 1989, the Air Force Court of Military Review modified the findings by deleting that portion of the specification under Charge II relating to felony murder, but otherwise affirmed the findings of guilty and the sentence. *United States v. Mobley*, 28 M.J. 1024 (A.F.C.M.R. 1989) [Appendix D]. Appellant then submitted a Petition for Grant of Review with the United States Court of Military Appeals raising seven distinct assignments of error. On March 13, 1990, that Court granted appellant's Petition and ordered the submission of additional briefs on four of those issues.

After oral argument was heard, the Court of Military Appeals set aside the decision of the Air Force Court of Military Review and remanded the case to that court for reconsideration on the issue of whether the trial counsel's argument impermissibly commented on appellant's failure to testify. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990) [Appendix C]. On December 19, 1991, the Air Force Court of Military Review held that the argument by trial counsel was impermissible in that it was calcu-

lated to bring the members' attention to the fact that the appellant did not testify and unfairly exploited his silence, but that this error was harmless. *United States v. Mobley*, 34 M.J. 527 (A.F.C.M.R. 1991) [Appendix B]. Upon return of the case to the Court of Military Appeals, that court affirmed the original opinion of the Air Force Court of Military Review.

REASONS FOR GRANTING THE WRIT

I. THE CLOSING ARGUMENT OF THE TRIAL COUNSEL WAS IMPROPER IN THAT IT INVITED THE MEMBERS' ATTENTION TO THE FACT THAT APPELLANT DID NOT TESTIFY, EXPRESSED COUNSEL'S PERSONAL BELIEF THAT APPELLANT WAS GUILTY AND COMMENTED ON THE FAILURE OF THE DEFENSE TO CALL VARIOUS WITNESSES.

Repeatedly throughout his closing argument, the trial counsel implicitly made references designed to highlight and exploit the fact that appellant had exercised his constitutional and statutory right not to testify on his own behalf. The relevant portions of the argument are set forth as follows:

> Sergeant Mobley, why didn't you go back to the NCO club and cash any more checks? You didn't need any, more money? No. The NCO Academy lasted for another full week. Sergeant Mobley, why did you cash but a $15.00 check when you have the evening planned at Tootsie's? Were you scared to go back to the NCO club because someone might recognize you? Why had you terminated with extreme prejudice, your interest in the NCO club?
>
> Now, here Sergeant Mobley, is where I can't figure out what you did next.
>
> You know something else, Sergeant Mobley, what I can't figure out is, how that shoe print got on the window? Was it there when you were trying to

mount her, or was it there when you were getting leverage to crush her neck? *I don't know. We'll never know.* That's one of those things that's going to be an imponderable. (emphasis added)

What I can't figure out at this point, Sergeant Mobley, is why you didn't rape her? You had her there. She was unconscious. You got her panties off, you got her panty hose down to mid-thigh. Why didn't you rape her? Was it because the scratches hurt? Was it because she urinated on herself? Was it because the blood on her face and the sound of her gagging on her own blood turned you off? *I don't know, is there some other reason you couldn't get the job done? I don't know.* The point of the matter, members of the court, is, we don't have to prove why he didn't get the job done. It can be any of those reasons. He got in the car intending to and attempting to rape her. *And why it wasn't finished no one knows.* (emphasis added).

Sergeant Mobley, *no one knows . . . So what we don't know, another one of those unanswered questions. . .* Now, Sergeant Mobley, let's give you the benefit of the doubt. Let's say for instance that you really didn't mean to kill her, just to shut her up for a while. The question that naturally arises, what in the name of God were you thinking that you would be doing to that woman? . . . But, *Sergeant Mobley, what was going through your mind in those one to two to eight minutes? What could you have been thinking of? Were you thinking of your career? Were you thinking of the lie you'd tell if you ever got caught? Or did you not care.* (emphasis added).

All the people you played basketball with through the entire academy didn't see you playing basketball. Sergeant Redman went by the court where you all always played, and there wasn't anybody there. *Did you go somewhere else. Who knows?* (emphasis added.)

Do you know what Sergeant Mobley, we're talking Sergeant Williams and Sergeant Redman, and there's

> Sergeant Porter . . . And you know what, you avoided Sergeant Porter that last week, that week after the 7th of February. *Now, why did you do that Sergeant Mobley?* Why did you leave the same seat you had set in every day of the academy because you and Sergeant Porter had known each other when you were in Iceland, why did you leave that seat and go to the back where he wouldn't see you? *Why did you avoid him? What was there different about you that he might have seen?* (emphasis added).
>
> *Well Sergeant Mobley, what doesn't make sense in all that is, if she was letting you do what you wanted to do, why did you go back up north and kill her? Why did you go back, up her body and put your fingers on that woman's throat, and use your upper body strength to crush the life out of her? If she's consenting to all of these things there is no need to kill her. Not a one.* (emphasis added).
>
> If you were attempted [sic] to buy off on the foolishness that the accused was discovered, then ask yourselves, *Sergeant Mobley, why are you sticking around? Why don't you get out of there? Why are you staying around to be clawed? Why are you staying around to get blood on your jacket? Why don't you leave? And, ask Yourselves the most important question, why didn't you tell us about it later.* (emphasis added).

In addition to these quotes, this argument, in more general terms, was repeatedly directed personally toward appellant, both in words and gestures. Accordingly, the defense objected to the improper argument of the trial counsel and requested a mistrial. The military judge refused to grant the requested relief on the basis that these comments were "merely rhetorical."

It is submitted that these statements are clearly improper and prejudicial. These specific statements were not merely "rhetorical questions." Rather, it is submitted that they constituted a calculated and deliberate ploy to

call attention to the fact that appellant did not testify and that there were many unanswered quesions which only appellant could answer. Furthermore, they must not stand as "harmless error." In applying either the four-step test from *Lent v. Wells*, 861 F.2d 972, 975 (6th Cir. 1988), or a broader "totality of the circumstances" test, it is clear that this case must be corrected.

The closing argument used at trial by the prosecutor was obviously the well-prepared product of a very experienced trial counsel. His repeated references to appellant, the questions which were directed to him and which called for an answer, and the subsequent comments on the fact that they remained unanswered were not inadvertent or accidental. Rather, they were deliberately inserted into the argument by the trial counsel in a conscious attempt to sustain or circumvent his burden of proof by implicitly asserting that appellant must be guilty because he did not testify. It is beyond debate that the argument commented upon the appellant's failure to testify ("the rhetorical questions were addressed to the appellant in a manner calculated to bring attention to his silence." *United States v. Mobley*, 34 M.J. 527, Appendix B at p. 3.) or that they were impermissable ("The argument improperly highlighted the appellant's failure to testify, a decision that is protected by the Fifth Amendment." *Id.* at 5.)

It is also axiomatic that a "trial counsel cannot comment directly, indirectly, or by innuendo, on the fact that an accused has exercised his constitutional and statutory right to remain silent at trial". *United States v. Mobley*, 31 M.J. at 279, Appendix C at p. 10; *Griffin v. California*, 380 U.S. 609 (1965); *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983); 18 U.S.C.A. § 3481 (Supp. 1992). As Judge Cox noted in his opinion, not only did the trial counsel venture into improper argument, but:

> the record and the words seem particularly focused on the accused silently sitting in the courtroom, being

> bombarded with questions that he could not answer, and then listening to answers that he could not contest. The practical effect of the technique used by trial counsel was to do indirectly what he could not do directly: that is, to cross examine a mute defendant. He would ask the rhetorical questions, then imply the questions he hoped to elicit from appellant.

United States v. Mobley, 31 M.J. at 279, Appendix C at p. 10-11.

As such:

> Careful reading of the entire argument persuades us that many of the trial counsel's comments passed the bounds of oratorical flourish and became objectionable as unfair comment on the appellant's decision not to testify in his own behalf. By innuendo, they shifted the burden of producing evidence to the appellant, who sat silent in court. The trial counsel's argument was objectionable, because in a strict legal sense it unfairly exploited the appellant's decision not to testify.

United States v. Mobley, 31 M.J. 273, Appendix C at p. 3. The government's theory of the case was that only appellant and Mrs. Torres were at or in the car that night and that there were no other parties involved. Since Mrs. Torres was unable to testify, the only individual who could answer these questions, in the view of the trial counsel, was the appellant. It has been held that when questions are asked and the answers could only have come from the accused, and when the trial counsel argues that no such answers were forthcoming, the trial counsel, either intentionally or inadvertently, has made an improper comment upon an accused's right not to testify. *Griffin v. California*, 308 U.S. 609; *United States v. Gordon*, 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963); *United States v. Saint John*, 23 U.S.C.M.A. 20, 48 C.M.R. 312 (1974). Thus, as in the instant case, when the trial counsel specifically directed numerous questions to appellant, called upon him to answer those questions and repeatedly

commented, "I don't know", "we'll never know", "no one knows", "another one of those unanswered questions", or "who knows", the attention of the members was clearly—and impermissably—invited to consider the fact that appellant did not testify. Such a conclusion is especially waranted when it is noted that the trial counsel explicitly suggested that the *members ask themselves why Sergeant Mobley didn't tell them why he did certain things.* Implicit within in such an argument is the clear impression that, an "innocent man has nothing to hide, no reason to exercise his rights; the fact that appellant sought refuge behind his rights suggests he was not innocent." *United States v. Clifton*, 15 M.J. at 30; *United States v. Moore*, 1 M.J. 390, 391 (C.M.A. 1976). Any servicemember, or any citizen, is entitled to assert his or her right to remain silent at any time without fear of exploitation. Similarly, he is not obligated to "admit to anything" or to "tell anything" and may require the government to attempt to meet its burden of proving his alleged guilt beyond a reasonable doubt. *United States v. Clifton*, 15 M.J. at 30. This subtle shift in the burden of proof was insidious, purposeful and prejudiical. It was not sanctioned by either of the courts below. The appellant asks this Honorable Court, however, to find that the argument was prejudicial —and in the process clearly defining the parameters of such conduct as not only impermissible, but reversable as well.

A separate aspect of this same argument which must also be considered is the repeated references by the trial counsel to his opinion that appellant was a "liar". Trial counsel asserted in his opening statement that he would prove that appellant had made statements which were a "flat-out lie." During his case-in-chief, the trial counsel admitted an exculpatory statement made by the appellant which denied any involvement in the charged offenses and immediately proceeded to attack the veracity of collateral parts of the document in an attempt to prove attempt to show duplicity on the part of the appellant. Trial coun-

sel even went so far as to call numerous witnesses who opined that the document (and appellant's story) were not true.

It is readily apparent that the government did not use this statement for any purpose as substantive evidence. Rather, it was used solely as a means of attacking appellant's character and impeaching him despite the fact that he had not testified as a witness. By offering this statement and presenting evidence which was explicitly designed to contradict and rebut collateral and relatively unimportant parts of appellant's prior exculpatory statement, the government directly attempted to demonstrate, and specifically argued, the perceived untruthfulness of the statement and that appellant was a "liar" when he denied committing the charged offenses. In essence, the trial counsel put the appellant on the stand (in the form of his statement) and then called witnesses to rebut the perceived "testimony." If there was any doubt of the trial counsel's motives in producing this testimony, it was erased during his closing argument. Repeatedly, the trial counsel claimed that the testimony of the various government witnesses concerning minor parts of his statement clearly demonstrated and proved that appellant was a "liar":

> Mr. President, members of the court, you have . . . sat here in the disquieting presence of a man, this accused, who is a liar. *He is a liar because he is a murderer*, and he is a murderer because he wanted to be a rapist. (emphasis added).
>
> . . . on the 17th of February when you talked to Special Agent Brown and Sergeant Dusty Hesskew . . . [y]ou made a *conscious decision to compound your criminality by covering it up.* (emphasis added).
>
> . . . Sergeant Mobley, because now your friends, your academy classmates, are starting to *make you out as a liar*. . . . (emphasis added).

> . . . you lied to Brown and you lied to Hesskew because you were concerned about the consequences. You were concerned about the affect [sic] on your career to have been in such a circumstance . . . .Mr. President, members of the court, the reason that he didn't on the 17th of February, give you that fair and rational hypothesis except his guilt [sic], except a bald face denial that he'd ever been in the car, that he ever knew the woman, the reason was, he hadn't had time to discover what they had on him, *to make up a lie* that he hoped would save his life. He didn't have time to discover the nature of the prosecution's evidence against him . . . . And, here now, months later, *the lies fully develop.* (emphasis added).
>
> On the 17th of February, 1987, the accused is asked for an explanation of his scratches. He comes up with a couple of real whoppers . . . . That is but one other example of the utterly unbelievable, the utterly preposterous lies that have been floated throughout this case. They began on the 17th of February 1987 when the excuse was brought forward, when the accused had nothing else, he had nothing else to base it on.

Clearly, the implication of this argument was that only guilty people lie, and since appellant had allegedly not told the complete truth in his prior statement, therefore, he must be guilty and attempting to "cover up" his involvement. In fact, the trial counsel expressly argued this very point to the members on two separate occasions.

With regard to this expression of personal belief by the trial counsel as to the truth or falsity of any evidence or testimony, it is preliminarily noted that it has been denounced as a tactic on the part of counsel by the Military Courts. And, such assertions are deemed to be unprofessional conduct. *See ABA Standards, The Prosecution Function*, 5.8(b) (1971); *United States v. Clifton*, 15 M.J. at 30, n.5; *United States v. Fuentes*, 18 M.J. 41 (C.M.A. 1984); *United States v. Knickerbocker*, 2 M.J.

178 (C.M.A. 1977). In fact, in 1989 the Court of Military Review unanimously condemned a trial counsel for calling the accused a liar even when the accused had testified and where there were apparent inconsistent statements which had been made by the accused. *United States v. Stroup*, 29 M.J. 224, 231 (C.M.A. 1989).

By repeatedly opining that the statement made by appellant to Agent Brown was a "flat-out lie" and that appellant was a "liar," the trial counsel also violated these principles and rendered a personal opinion concerning the truth or falsity of various items of evidence which *he had introduced*. This fact takes on additional importance and significance when it is remembered that appellant did not testify at trial. Thus, the personal opinion and express statements of the trial counsel that the prior statement of appellant which denied any involvement in the charged offenses was a "flat-out lie" clearly manifested his personal opinion that appellant was guilty and thus, could not testify under oath at trial. This opinion constituted, as well, an implicit, but nonetheless impermissible, comment on appellant's exercise of his right to remain silent at trial. The prior statement was not used or argued as proof of any of the elements of the charged offenses on which the government had the burden of proof. Rather, it was used solely in an attempt to demonstrate that appellant had not told the complete truth on a prior occasion and, therefore, should be presumed to be guilty because he was continuing to "cover up" his actions. Such an argument and the inference which the members were expressly requested to draw is manifestly improper because it not only constituted an attempt to circumvent the government's burden of proof, *see United States v. Clifton*, 15 M.J. at 31, it also violated Military Rule of Evidence 404 as being an attempt to prove the alleged guilt of appellant by presenting evidence of "bad character."

The rules of evidence and procedure applicable to trials before court-martial are such that character assassination

of an accused is not permitted when the accused does not testify, especially when the defense has not opened the door for such impeachment and inferences. The government is not allowed to "kick the door in" when the defense does not even try to "open it". The Court of Military Appeals has declared that simple character assassination of an accused in an attempt to portray him as a liar so as to infer his guilt of the charged offenses is a "perversion of justice" and an "abomination." *United States v. Stroup*, 29 M.J. at 232, 234. This same conclusion must be reached in the case *sub judice* where appellant did not testify or place his character in issue in any manner.

A third way in which the trial counsel's argument was improper and violated appellant's constitutional and statutory rights was his repeated comments that appellant had a duty to call witnesses or to produce evidence of his innocence. During the Article 39(a) session where proposed instructions were discussed, the trial counsel asked the Military Judge to instruct the members that certain witnesses mentioned by the defense during *voir dire* had not actually been called to testify. The military judge refused to give the requested instruction on the basis that *voir dire* was not an evidentiary matter and that the instruction was unnecessary.

Despite this fact, the trial counsel argued this very point in his closing statement on the merits of the case:

> But, you remember promises that you've been made throughout the course of this trial. If you for instance made a promise during the voir dire section of this trial that you were going to hear a myriad or whole host of witnesses come in here and talk to you about a man's exemplary life, his family life, his military career—

After the defense interrupted and objected to this argument, the military judge stated to the trial counsel, "You're arguing questions asked on voir dire. You may argue the evidence and inferences from the evidence." However, the trial counsel immediately responded:

> Yes, sir. If for instance, there were assertions made that witnesses would come forward during the voir dire session, and these assertions were made that these witnesses would come forward to attest to—

At this point, the military judge stopped the argument as being improper and in violation of his previous ruling. given to the members at that or any subsequent time. No curative or cautionary instruction on this issue was given to the members at that or any subsequent time.

It is a principle of well-settled law that a court-martial must render its verdict solely on the basis of the evidence presented at trial. *United States v. Bouie*, 9 U.S.C.M.A. 228, 26 C.M.R. 8 (1953); *United States v. Clifton*, 15 M.J. at 29. This argument by the trial counsel clearly related to matters which did not constitute evidence and as such was improper. Clearly, the point which the trial counsel was attempting to convey to the members was that the defense had some type of an obligation or burden to produce evidence which supported their case and since no such evidence had been presented an inference could be drawn that appellant did not have a defense and was guilty.

Initially it is improper to suggest that the defense has *any* burden or obligation to present evidence. The burden of proving the alleged guilt of an accused is always on the government and never shifts to the defense. *United States v. Strangstalien*, 7 M.J. 225, 227 (C.M.A. 1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 258 (1970); Article 51(c)(4), U.C.M.J. Thus, any suggestion or inference that the defense has any obligation or burden to call witnesses or to present evidence is clearly impermissible.

Secondly, any inference based upon the failure of the defense to call certain witnesses who might have provided favorable testimony for appellant is improper as well. Military case law as well as the *Manual for Courts-*

Martial (M.C.M.) have expressly prohibited such an inference or argument. *United States v. Swoape*, 21 M.J. 414, 416-17 (C.M.A. 1986); R.C.M. 701(c), M.C.M., see also, *United States v. Goodyear*, 14 M.J. 567 (N.M.C.M.R. 1982). In this instance, the trial counsel made this argument immediately after his requested instruction on this very point was rejected by the military judge. Because this argument conveyed the impression that the defense had an obligation to call witnesses or to present evidence and implicitly asked the members to draw an inference adverse to appellant because such evidence was not presented, the argument was clearly impermissible and improper.

This same argument, though clearly improper, was made a second time by the trial counsel. The trial counsel expressly asked the members to draw an inference about the existence or nonexistence of evidence concerning whether appellant left the base and went to Tootsie's (a local bar), as he claimed in his statement, based on the fact that "there was no witness who came in here and said, yeah, I remember seeing Sergeant Mobley come through the gate at midnight, he had a bumper sticker on his car that read, "I've been to Tootsie's". As the trial counsel argued, the fact that no such witness testified means that "the logical conclusion is, there was no such person" because appellant never left the base.

It is submitted that such an argument deliberately conveyed to the members that the defense had an obligation to call such a witness in order to corroborate and affirmatively prove their contention that appellant was not guilty and had an alibi, and that in the absence of such proof, other evidence, which had been admitted and presented *by the government*, which had raised this issue and concerned just such an alibi, could be inferred to be untrue. In fact, the trial counsel even went so far as to specifically argue that because the defense did not call such a witness, the members could conclude that "there

was no such person" and no such alibi and that appellant was guilty. Clearly, such an argument is patently improper that it was a direct attempt to shift the burden of proof onto appellant and to create a presumption of guilt since appellant failed to call a witness who would have established his innocence. That such a contention is impermissable is an "axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. at 363 (*citing Coffin v. United States*, 156 U.S. 430, 453 (1895)); *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1970). Additionally, it is not proper for the trial counsel to comment on the failure of the defense to call a witness or to ask the Members to draw an inference as to what any such witness might have said. *United States v. Swoape*, 21 M.J. at 416-17; R.C.M. 701(c). Certainly, this Honorable Court cannot condone or sanction such an argument.

II. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE TAKEN FROM THE CRIME SCENE WHICH THE DEFENSE WAS NEVER ABLE TO EXAMINE OR REVIEW AS A RESULT OF THE GOVERNMENT'S ARBITRARY AND UNREASONABLE DECISION TO RELEASE THE CAR AND ITS CONTENTS TO MR. TORRES ON 25 FEBRUARY 1987.

In a pretrial motion, the defense requested that all evidence taken from the vehicle which was the apparent situs of the alleged offenses be suppressed because of the fact that the government released the car before the defense had been given the opportunity to inspect or examine it. The military judge denied this motion.

On 7 February 1987, Mr. Torres' car was seized by OSI and APD and transported to an impound lot. On 8 February 1987, Detective Hesskew collected various pieces of evidence from the car to include hairs, blood and semen samples and various pieces of paper. Additionally, some

apparent prints were revealed. At this time, the car had "several hundred" blood spots on the driver's window, the windshield, the door frame, the door, along the door handles and the arm rest, the bottom panel under the door, on the seat and on the seat belt. Detective Hesskew took samples of some spots of blood and "selectively removed blood samples from each area". Detective Hesskew measured these "several hundred" blood stains, determined their size and shape, their angle of impact with a calculator and traced the trajectory with strings.

The car was retained in the custody of APD under the direction of Detective Hesskew from 7 February until 25 February. On that date, the day *after* appellant was apprehended and placed in pretrial confinement and the *very day* on which charges of murder and attempted rape were preferred against appellant, Detective Hesskew released the vehicle to Mr. Torres. Detective Hesskew stated that the car was released because it was of "no further value to us". Although Agent Brown and OSI were advised of the proposed release and of the vehicle and asked if they had any objections, the defense was not provided the same courtesy. In fact, the defense was not notified of this fact until mid-March when the government finally provided the defense with a list of evidence in this case; Appendix at p. 3, 28 M.J. at 1027.

At trial, the bulk of the government's case which incriminated appellant was located in the vehicle or was derived from evidence found in the car. Appendix at 3; 28 M.J. at 1027. The government presented evidence relating to the hairs, semen and blood, prints and papers found within the car. Additionally, Detective Hesskew tesitfied as an expert in analyzing blood splatters and opined the relative positions of the victim and her attacker and the manner in which the injuries were inflicted. This evidence was doubly effective at trial, first because it purported to explain a gruesome, unwitnessed crime, and second, it was scientific evidence being offered by an expert. What rendered this evidence patently unfair was the

fact that the government guaranteed this evidence was irrefutable when they disposed of the evidence. The defense did not have the opportunity to examine the car and determine the respective locations and relationships between the various blood stains and other evidence relied on by the government, or to look for the existence or absence of any other evidence because of the release of the vehicle back to the husband of Mrs. Torres. Therefore, they had no meaningful way to impeach Detective Hesskew and his expert opinions, and the appellant was deprived of any meaningful opportunity to have a fair trial.

The Due Process clause of the Fifth Amendment, the Sixth Amendment right to confrontation and compulsory process and the guarantee of Article 46, U.C.M.J., to equal access to witnesses and evidence were materially violated in this instance because the government knowingly failed to satisfy its duty to protect relevant and material evidence and to make it available to the defense. It has been held on numerous occasions that the government has a duty to use good faith and due diligence to protect and preserve evidence and to maek it available to the defense. This Honorbale Court has acknowledged that a criminal accused has a constitutionally guaranteed right of access to evidence and to obtain evidence material to his guilt or innocence or relevant in sentencing. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Brady v. Maryland*, 373 U.S. 83 (1963). Due Process has been defined to be a "standard of fairness" which requires that a defendant be afforded a "meaningful opportunity to present a complete defense," and that he cannot be hampered in his preparation for trial. *California v. Trombetta*, 467 U.S. at 485-86. The test for determining if Due Process has been violated is whether the loss, destruction, or unavailability of the evidence has "diminished the defendant's opportunity to put on an effective defense." *California v. Trombetta*, 467 U.S. at 486, citing, *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982).

Although the constitutional standard applies to trials by court-martial, *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986), it is submitted that Article 46 imposes an even higher burden to ensure equal access to witnesses and evidence. This assertion is based on several statements by Judges of the Court of Military Appeals and previous decisions. In *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986), Chief Judge Everett specifically referred to the argument that the Code requires a higher standard to provide evidence to the defense than what is constitutionally required. While this comment was made in a slightly different context than the issue in the instant case, Judge Cox has recently addressed this precise issue in his remarks at the annual Homer Ferguson conference this past spring. Judge Cox commented that Article 46 could well impose a *higher* standard than that announced by the Supreme Court. The Court of Military Appeals appears to have accepted this position and has expressly ruled that Article 46 entitles the defense to equal access to all evidence, whether or not it is apparently exculpatory. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986), citing *United States v. Kern* (emphasis added). This Court also emphatically stated that the better and preferred practice is to inform the defense of any contemplated action which might result in the loss or unavailability of evidence and to permit the defense an opportunity to examine the evidence. *United States v. Garries*, 22 M.J. at 293. In a footnote, it was expressly noted that it would be difficult to excuse the failure to provide reasonable notice to the defense. *United States v. Garries*, 22 M.J. at 293, n.6. Thus, when evidence becomes lost or otherwise unavailable, the government bears "the burden of producing [it] or explaining why it could not do so." *United States v. Augenblick*, 393 U.S. 348, 355-56 (1969); *United States v. Garries*, 22 M.J. at 293, n.6.

When these tests are applied to the instant case, it is apparent that appellant was denied equal access to evi-

dence which was affirmatively used by the government to incriminate him and which diminished his ability to present an effective defense as a result of the government's unilateral and arbitrary decision to return the car and the evidence located inside to Mr. Torres (the initial suspect in the case) without affording the defense an opportunity to examine its contents. When the car was taken into custody by OSI and APD, the evidentiary value of the car and its contents was manifestly apparent and obvious. This was the situs of an alleged murder and all parties were aware that vital and irreplaceable evidence might be contained therein. Thus, it was treated with strict security to ensure that it was not tampered with or disturbed in any way until Detective Hesskew seized those items of evidence which he desired to have examined. In fact, the defense was not made aware of the car's release until several weeks later, after it had been thoroughly cleaned by Mr. Torres and made useless for any meaningful examination.

Detective Hesskew, the primary investigator in this case, was the one who made the decision to release the vehicle. It is crucial to also note that he was the individual who determined which blood stains would be sampled as "representative" of the larger groupings, collected the other evidence and decided which parts of the car needed to be further examined, either by vacuuming the interior of the car or by testing for any prints. Additionally, he was the expert relied on by the government at trial to testify about his theory of the attack as a result of his analysis of the blood stains. It is submitted that when, as in this case, the primary government investigator who is also called as an expert witness is the individual who decided what evidence is to be retained and made available to the defense, an inherent conflict of interest has been established. In such a situation, it is submitted that Detective Hesskew could not have made a truly impartial and neutral decision regarding the retention or release of the vehicle and its contents. Be-

cause of the fact that he wore three "hats", that of chief investigator, the examiner of the car and an expert on blood splatters, Detective Hesskew had a vested interest in seeking to avoid any criticism of his case, his activities in examining the car or his conclusions concerning the blood splatters. Because of his deep and continuing involvement in the investigation and prosecution of this case, the unilateral decision of Detective Hesskew to release the car to prevent defense scrutiny of his work cannot be deemed to be made in good faith sufficient to excuse the resultant loss of evidence with regard to the defense. Detective Hesskew was the only individual who thoroughly examined the car. It is not beyond human experience for one not to want others reviewing his examination and challenging his thoroughness, methods or conclusions. It is the presence of his interest which further taints the government's decision to return the car which had previously been retained and held as material evidence. With the evidence preserved, the Defense might have employed an expert who could have retraced Detective Hesskew's steps and perhaps effectively criticized or ameliorated his use as an expert at trial. Detective Hesskew's release of the car prevented this criticism. As a result of this action, the defense was completely denied the opportunity to examine the car at all—rendering the defense totally blind to whether the car contained exculpatory evidence, or even a rudimentary basis upon which to cross examine the government's unrefutable expert who doomed the appellant with his ability to opine with impunity.

Due Process and fundamental fairness, not to mention the Sixth Amendment and Article 46, are violated in such a situation where the government is allowed to benefit as a result of their knowing and conscious decision to make evidence unavailable to the defense after it has been used to the substantial prejudice of appellant. Clearly, the leading cases in this area are *Arizona v. Youngblood*, 488 U.S. 51 (1988), *California v. Trombetta*,

467 U.S. 479 (1984), *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986) and *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). While those cases did not find reversible error with regard to the particular facts presented therein, specific principles of law were announced which are applicable to the case *sub judice*. Certainly, none of those decisions were intended or anticipated to sanction the destruction or loss of the crime scene of a murder after an accused had been charged, but before the defense had been afforded an opportunity to examine the situs of the *res gestae*. Even in *Youngblood*, the case most supportive to the prosecution in this area, the Supreme Court specifically noted that the state had not attempted to use any part of the evidence which had not properly been preserved and implied that a different result probably would have been reached if the state had intentionally sought to gain a tactical advantage over the defendant. *Arizona v. Youngblood*, 488 U.S. 51 (1988).

It is submitted that this very situation occurred in the case *sub judice*. Here, appellant was materially and substantially prejudiced as a direct result of Detective Hesskew's decision not to retain the car as evidence. The government was able to examine the car and use that portion of the evidence inside which it deemed appropriate in reaching expert conclusions, particularly Detective Hesskew's blood splatter analysis, but also to a lesser extent, the testimony concerning the other items found in the car such as hairs, blood and semen, and the various papers and prints. Despite this affirmative use by the government of this evidence, the defense was denied access to the car and "several hundred" blood stains for which samples were not taken. Certainly, a situation where the government uses the evidence to implicate an accused, but then knowingly makes that evidence unavailable to the court, the defense and any independent testing is not consistent with Due Process, fundamental fairness or Article 46.

All of these cases expressly reiterate the requirement that the government has a duty to preserve evidence which "might be expected to play a significant role" in the accused's defense. *California v. Trombetta*, 467 U.S. at 488. *Trombetta*, *Kern* and *Garries* each were announced well before the instant case arose. Accordingly, the government and its agents were, or certainly should have been, aware of the requirements of those decisions to preserve and afford defense access to evidentiary items. Despite this fact, specific aspects of those decisions were ignored and knowingly violated in the instant case. The materiality and crucial importance of the car and its contents was apparent and specifically known by all parties. The government had taken the car into custody as evidence and retained it as such for 2½ weeks. It was their expressed opinion that the evidence found in the car would be the key in determining the identity of the perpetrator and in attempting to reconstruct the events which occurred. Not only did the government retain the car and its contents as evidence, it was affirmatively used in preparing the government's case against appellant. In fact, the evidence from the car was the most important evidence available to the government against appellant. Yet on the very day on which appellant was charged with murder and attempted rape, the government released the car back to their initial suspect in the investigation and the husband of the victim. Not surprisingly, the evidentiary contents of the car were lost forever. No notice was provided to the defense of this impending release of evidence and the defense had no opportunity to examine this material and crucial evidence which formed the basis for the government's case against appellant and the resultant findings of guilty which were announced by the members.

The Court of Review relied on a characterization of the vehicle as a "crime scene" to conclude that there is no constitutional, statutory, or judicial rule which required police authorities to retain and preserve the vehicle for

defense examination. Appendix at 4, 28 M.J. at 1028. It is submitted that the vehicle in this instance was much more than just a crime scene. Rather, it had its own independent evidentiary value because of the "several hundred" blood stains which had been measured and evaluated by Detective Hesskew, but which the defense, or any other individual, was not permitted to examine. Because the car contained evidence which was used by the government in their case against appellant, the requirements of *Kern* and *Garries* certainly applied and mandated preservation of the vehicle, at least until the defense had an opportunity to examine it. Such a rule would not impose an unreasonable burden on law enforcement officials and constitutes the bare minimum in terms of fundamental fairness and equal access to evidence. It is also of no consequence whether the car was likely to have held exculpatory evidence. It is beyond question that the car held, at the very least, the evidence necessary to craft a competent cross-examination of the government's expert. However, since the defense was never afforded the opportunity to examine the contents of the car, appellant's opportunity to present a complete and effective defense was diminished. Accordingly, appellant's right to Due Process and his right to equal access under Article 46 were violated and corrective action by this Honorable Court is required.

This Court has not determined a particular remedy when it has been established that material evidence has been lost or destroyed by the government and where no comparable evidence is available to the defense. Thus the judiciary may fashion such remedies as are appropriate to protect the fundamental rights of appellant. *United States v. Kern*, 22 M.J. at 52, (*citing United States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979) (*en banc*) (Kennedy, J., concurring in which five judges joined [six of eleven sitting]), *cert. denied*, 445 U.S. 917 (1980)); and *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980).

Several courts, including the Air Force Court of Review, have stated that they would apply a "balancing" test in these types of cases where evidence in the possession of the government has become lost or destroyed. In such a case, this test would be performed by balancing the "quality of the government's conduct" against the "degree of prejudice to the accused" as the most appropriate means to reconcile the competing interests in these situations. *United States v. Greene*, 12 M.J. 862, 865 (A.F.C.M.R. 1982) (*citing United States v. Loud Hawk*); *United States v. Torcero*, 640 F.2d 190 (9th Cir. 1980); *United States v. Miranda*, 526 F.2d 1319, 1324 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976). In addressing the specific factors set forth in *Greene*, *Loud Hawk*, *Torcero* and *Miranda* to the facts of the case *sub judice*, it is readily apparent that the government intentionally and knowingly released the car and its contents back to the initial suspect in the investigation who also happened to be the victim's husband. This release occurred after the car bad been retained for several weeks and used in developing evidence to be used in the criminal prosecution of appellant. The failure to give any notice to the defense of the contemplated release, despite the fact that advance notice was given to OSI and the fact that it was known that counsel would soon be appointed to represent appellant, constitutes a manifest disregard for the interests of appellant, or any concern about the concepts of fair play or justice.

It is submitted that these facts clearly demonstrate that the government was at least negligent, if not even more culpable, in failing to adhere to standards of care required for criminal prosecutions. *Kern* had been decided the year before this case was started and expressly stated that the government has a duty to use good faith and due diligence to protect and preserve evidence and to make it available to an accused. *United States v. Kern*, 22 M.J. at 51. Additionally, the court warned that:

> Careful prosecutors will notify the defense of the intention to return [evidence], thereby allowing the defense to conduct an independent examination of the property and placing on the defense the onus of requesting that property be retained for use as evidence at trial. This should bring to light any non-apparent exculpatory value of evidence to the defense case and forestall the creation of an appellate issue. In other words, this case does not do away with the rule of reason applicable to police agencies or to prosecutors in dealing with evidence. Moreover, it does *require a diligent effort by prosecutors to protect and preserve* exculpatory evidence and make it available to the accused for use in his defense.

United States v. Kern, 22 M.J. at 52-53 (emphasis added).

This same requirement was repeated in *United States v. Garries* where the Court of Military Appeals stated that Article 46 entitles the defense to *equal access to all evidence, whether or not it is apparently exculpatory. United States v. Garries*, 22 M.J. at 293, (*citing United States v. Kern*) (emphasis added). The court went on to emphatically state that the better and preferred practice is to inform the defense of any contemplated action which might result in the loss or unavailability of evidence and to permit the defense an opportunity to examine the evidence. *United States v. Garries*, 22 M.J. at 293. In a footnote, it was expressly noted that it would be difficult to excuse the failure to provide reasonable notice to the defense. *United States v. Garries*, 22 M.J. at 2930 n.6. Finally, it is noted that the duty to protect and disclose evidence to the defense applies not only to prosecutors, but also to all governmental investigative agencies. *United States v. Turner*, 15 M.J. 754, 755 (A.F.C.M.R. 1983); *United States v. Kern*, 22 M.J. at 53; *California v. Trombetta*, 467 U.S. at 488. Since the specific and recent pronouncements of the Court of Military Appeals were inexcusably ignored and not complied with in any regard in the case *sub judice*, the government committed prejudicial error by deliberately failing to preserve the vehicle after they

had used the evidence contained therein in preparing their case, and without which a conviction would most likely *not* have occurred.

Consideration of these factors clearly establishes that the government's deliberate decision to release the car and its contents without any notice to the defense deprived the defense of the opportunity to prepare a competent defense and the appellant of his right to a fair trial. It has been held on several occasions that where, as in the instant case, destruction of evidence by the government is "deliberate, sanctions will normally follow . . . ." *United States v. Grammatikos*, 633 F.2d at 1020; *United States v. Bufalino*, 576 F.2d 446, 449 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). It is submitted that the government's conduct is so culpable and inexcusable, and the resultant prejudice to appellant is so manifest, as to question the reliability and fundamental fairness of the case *sub judice*.

It cannot be disputed that the release of the vehicle was clearly a deliberate and knowing act. This was a conscious decision and advance notice of the proposed release was even provided to OSI for their recommendations on the matter. This canont, in any way, be seen as an inadvertent or negligent act. It was a deliberate, knowing and conscious decision made by responsible individuals in charge of the investigation who were aware of the significance of their actions. Because these individuals were on notice of the duty to preserve this evidence at least until such time as the defense was afforded the opportunity to examine it by various decisions by this Honorable Court, the Court of Military Appeals and various federal circuit courts, sanctions are appropriate because of the deliberate disregard of this duty. In this regard, is noted that the time of the release is particularly, significant. Several courts have observed that the destruction of evidence at the end of an investigation when the government has knowledge that an indictment and

trial are forthcoming is a factor which makes it more difficult for the government to meet its burden to explain this action. *United States v. Grammatikos*, 633 F.2d at 1021; *United States v. Miranda*, 526 F.2d 1319; *United States v. Bufalino*, 576 F.2d 446. Not only was this factor present in the instant case, the car was released *the very day that charges were preferred against appellant and the very day that trial defense counsel was detailed to represent him.* It is submitted that this was not coincidental, but rather that it establishes that the government's motivation was to use this evidence during their investigation, while preventing appellant or his counsel from having access to it. There was absolutely no reason which necessitated this release other than the fact that the car was of "no further value" to the government because appellant had been apprehended and charged. Certainly, this evidence could have been retained and preserved for at least a few more days to allow the defense an opportunity to inspect it. Because there was no legitimate reason why this evidence was not preserved for defense inspection when it clearly could have been it is submitted that at least some degree of bad faith is established which requires and compels corrective action from this Honorable Court.

It has been stated that the principle concern of courts in addressing this issue is to ensure that the accused was provided with the "opportunity to produce and examine all evidence and to insure a fair trial" and that the judiciary, has a "significant interest to avoid impairment of judicial integrity that would occur if the prosecution is allowed to manipulate court processes." *United States v. Loud Hawk*, 628 F.2d at 1151 (Kennedy, J., concurring). It is submitted that the case *sub judice* is the perfect example of how the deliberate actions of responsible government agents deprived appellant of the opportunity to examine and produce evidence which was affirmatively used by the prosecution before it was destroyed. Similarly, this case is a perfect example of how fundamental rights of an accused are circumscribed and prejudiced what

the government knowingly and consciously refused to comply with standards specifically mandated by several binding judicial decisions. In such a case, it must be determined that the Fifth Amendment guarantee of Due Process, as well as the guarantees of the Sixth Amendment and Article 46 to equal access to evidence, have been violated.

CONCLUSION

The petitioner's case is a worthy one for a grant of certiorari. Review of this case is crucial because it strikes at the heart of our adversarial system of justice: do we hold the prosecutorial arm of our system to their high burden of fundamental fairness, or do we reward impermissable argument and destruction of evidence with convictions and the slap on the wrist of "harmless error." When the appellant failed to take the stand, a nervous trial counsel with a borderline case took the wholly unreasonable stance of putting both appellant's words and his silence on trial. Without legal justification, the appellant was forced to defend a prior statement put into evidence by the government. He was called a "liar" and dared to refute it. Then, he was forced to sit mute and powerless as his choice to remain silent was paraded before the members as a failure to rebut the contentions of his guilt. This shifting of the constitutional burden was the last of a long list of constitutional infirmities that plagued this case—defects which have been carefully separated and individually dubbed "harmless error."

In addition, this court should independently weigh the issue of whether the appellant was denied his constitutional rights to due process and his opportunity to confront the evidence against him in accordance with the fifth and sixth amendments, respectively, of the United States Constitution. Specifically, the government should not be allowed to abuse the adversarial process by hoarding evidence for the express purpose of perfecting their case and then releasing that evidence to be destroyed with-

out *any* notice to the incarcerated appellant or his legal representative. This case is factually distinct from *Youngblood* in the critical sense that the evidence which was released in the case *sub judice was* used as the critical convicting blow against the appellant. Following the rule of the case, this was an impermissable denial of evidence to the appellant which had the specific effect of rendering the government's expert impervious to any meaningful cross-examination and guaranteeing the inability to refute the scientific evidence which the government used like a club on the powerless defense.

Surely, this Honorable Court does not wish to condone this type of activity. This case provides an excellent opportunity to redefine the parameters of governmental conduct within our adversarial system, and to reaffirm the basic tenets of fundamental fairness which are crucial to any respected judicial system.

Respectfully submitted,

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August 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 63206/AF
CMR Dkt. No. 26528

UNITED STATES,

Appellee,

v.

GERALD I. MOBLEY (565-86-1085),

Appellant.

ORDER

On further consideration of the above-styled case in light of the opinion of the United States Air Force Court of Military Review after remand from this Court, 34 MJ 527 (December 19, 1991), and the supplemental briefs filed by counsel, we conclude that the opinion is correct as a matter of law. Accordingly, it is, by the Court, this 15th day of May 1992,

ORDERED:

That the decision of the United States Air Force Court of Military Review dated July 18, 1989 (28 MJ 1024), is reinstated; and

That the decisions of the United States Air Force Court of Military Review dated July 18, 1989, and December 19, 1991, are affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (HOLMES, Esq.)
Appellate Government Counsel (SINWELL)

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

(ACM 26528 (f rev).

UNITED STATES

v.

Technical Sergeant GERALD I. MOBLEY,
FR565-86-1085, United States Air Force

Sentence Adjudged 2 Sept. 1987

Decided 19 Dec. 1991

Before LEONARD, RIVES and JAMES, Appellate Military Judges.

OPINION OF THE COURT UPON FURTHER REVIEW

RIVES, Judge:

At the conclusion of a 3-week murder case, the trial counsel delivered an eloquent and persuasive findings argument. No objection was lodged until after the argument, when the defense moved for a mistrial. The defense counsel urged that the trial counsel had made numerous inappropriate comments that encouraged the members to speculate about the appellant's failure to testify. While we find the trial counsel's argument was improper, we hold that the error was harmless beyond a reasonable doubt.

The United States Court of Military Appeals, 31 M.J. 273 (C.M.A. 1990), set aside our initial decision in this case, 28 M.J. 1024 (A.F.C.M.R.1989), and returned the record of trial to us for resolution of these questions:

1. Did trial counsel's argument constitute unfair comment on, or otherwise unfairly exploit, appellant's failure to testify in his own behalf?

2. Was defense counsel, in fact, precluded from objecting to trial counsel's argument by AFR 111-1, any local rule of practice, Air Force policy, or decision of the Air Force Court of Military Review?

3. If trial counsel's argument was error, did the military judge's instructions cure any harm resulting therefrom?

4. If trial counsel's argument was error, was it harmless beyond a reasonable doubt?

31 M.J. at 280. We answer the first question and the last two affirmatively and the second in the negative and will address them seriatim.

I

Trial Counsel's Argument

The appendix to the earlier Court of Military Appeals decision in this case, 31 M.J. at 280-82, contains excerpts of the trial counsel's findings argument. The appellant complained in his pleadings before both this Court and the Court of Military Appeals that the trial counsel's argument improperly invited the court members' attention to the fact that he had not testified. Our earlier review of this case examined several matters in detail, then generally found no merit in this issue and the other matters raised. 28 M.J. at 1027, 1035.

Closing argument is an art wherein the facts and law are mustered to produce a persuasive case for the advocate. Argument is not evidence, but it is an opportunity to assist the fact finder to understand and interpret the evidence. Within limits, counsel can be creative. We realize that "[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a

gray zone." *United States v. Young*, 470 U.S. 1, 7, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985). Each case necessarily turns on its own facts. *United States v. Abbott*, 17 U.S.C.M.A. 141, 144, 37 C.M.R. 405, 408 (1967).

This trial counsel wanted to cut a fine line to sway the members without crossing into obviously illegal argument, so he did not directly attack the appellant's reliance on his constitutional right to remain silent. The issue is whether his allusions to the appellant's failure to testify nevertheless went too far.

Clearly, the defensive shield that allows an accused to remain silent at trial must not be transformed into a prosecutor's sword in argument. The Court of Military Appeals decision in this case affirms the "black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." 31 M.J. at 279, *citing Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *see also United States v. Clifton*, 15 M.J. 26, 30 (C.M.A.1983) (deciding it "was unconscionable for trial counsel repeatedly to emphasize appellant's assertion of his rights"); *see generally* Annotation, *Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as Amounting to Improper Reference to Accused's Failure to Testify*, 14 A.L.R.3d 723 (1967).

We recognize the disadvantages of an appellate court in reviewing an issue of this nature. As Judge Cox notes, we are limited by the "cold, written record" and do not benefit from actually being present in court "to observe [the] demeanor" of the counsel making the disputed argument. 31 M.J. at 279; *see* Article 66(c). Further, this argument was seen and heard by the military judge, who did not intervene sua sponte.

In his argument, the trial counsel posed various questions and then answered them based upon evidence that was before the court, a technique that can be both effec-

tive and permissible. The defense counsel did not object as the comments were made. When he lodged his objection in an Article 39(a) hearing, the military judge pronounced his view that the trial counsel's comments were merely "rhetorical."

Unfortunately, the rhetorical questions here were addressed to the appellant in a manner calculated to bring attention to his silence. Careful reading of the entire argument persuades us that many of the trial counsel's comments passed the bounds of oratorical flourish and became objectionable as unfair comment on the appellant's decision not to testify in his own behalf. By innuendo, they shifted the burden of producing evidence to the appellant, who sat silent in court. The trial counsel's argument was objectionable, because in a strict legal sense it unfairly exploited the appellant's decision not to testify.

II

Restrictions on Objections?

The defense did not object to the improper remarks as they were made. The lack of a contemporaneous objection helped permit continuation of the trial counsel's rhetorical technique, which leads to our remaining issues for review.

After the military judge recessed court at the close of the trial counsel's argument, the defense requested an Article 39(a) session. The lead defense counsel then asked for a mistrial because of "improper argument." He asserted that the trial counsel had "fired rhetorical questions at [the appellant] repeatedly calling attention to the fact that [the appellant] did not testify." The defense counsel sated that he had not objected during the trial counsel's argument 'because of course, the regulation under which we live, AFR 111-1 provides that you should not object during argument." He added that had such an objection not been sustained, he "did not want

to be in the position of attempting to derail [the trial counsel]'s argument in any way."

We are satisfied that no aberrant rule prevented the trial defense counsel from immediately objecting to the improper argument of the trial counsel. To be certain, following remand of this issue we ordered appellate government counsel to produce any Air Force or local rule of practice that might have inhibited the trial defense counsel from objecting immediately to the improper closing argument. No such rule existed.[1] No Air Force rule or policy restricted the defense from lodging a contemporaneous objection to the trial counsel's argument.

It is well-established that a prosecutor may strike hard blows in argument, and the failure of the defense to object to improper argument normally constitutes waiver. *United States v. Doctor*, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956); *United States v. Collins*, 3 M.J. 518, 521 (A.F.C.M.R.1977). Without question, an immediate objection would have been appropriate here. It also would have been most effective. Using the defense counsel's language, a prompt objection could indeed have "derailed" the trial counsel from pursuing his line of objectionable rhetorical questions. We note, however, that failing to object *during* argument did not waive the objection. The objection is preserved so long as it is made "before the military judge begins to instruct the members on findings." R.C.M. 919(c). The deferred objection here was timely, if not tactically sound. *See generally United States v. Wood*, 18 U.S.C.M.A. 291, 293, 40 C.M.R. 3, 5 (1969).

It is appropriate to consider whether the military judge erred by failing to interrupt the improper portions of the

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[1] The sole remotely relevant rule at the time of the appellant's court-martial is contained in Air Force Regulation 111-1, *Military Justice Guide*, Attachment 2, Rules for Trial Courts, Rule 5.14 (1 August 1984). That rule prohibits argument of "untrue" facts or circumstances and it proscribes interjection of personal opinions into argument.

argument. Sometimes an argument is so outrageous that the military judge, who "is more than a mere referee," must interrupt sua sponte "to assure that the accused receives a fair trial." *United States v. Graves*, 1 M.J. 50, 53 (C.M.A.1975); *see also United States v. Grady*, 15 M.J. 275 (C.M.A.1983); *United States v. Nelson*, 1 M.J. 235, 238-39 (C.M.A.1975). Here, the military judge viewed the argument as acceptable commentary that did not improperly invite, in his words, "attention to the fact that the accused did not testify in his own behalf." Of course, had the military judge recognized that the trial counsel's argument was improper, he should have immediately provided a cautionary instruction to the members. R.C.M. 919(c), Discussion; *see United States v. Kilbourne*, 31 M.J. 731, 734 (A.F.C.M.R.1990). While disagreeing with the trial judge's characterization of the argument, we do not find the argument was so egregious as to have required the military judge to interrupt on his own motion.

III

The Mistrial Motion

When the defense counsel finally voiced his objection to the trial counsel's argument, he specifically requested a mistrial. Mistrial is a drastic remedy and is mandated only when "manifestly necessary in the interest of justice." R.C.M. 915(a). Declaring a mistrial is a matter within the discretion of the military judge, and his decision will only be reversed for a clear abuse of discretion. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A.1990); *United States v. Dennis*, 16 M.J. 957, 965 (A.F.C.M.R. 1983). Although the military judge erroneously ruled that the argument was not improper, we conclude that he did not abuse his discretion in denying this motion. *See United States v. Evans*, 27 M.J. 34, 39 (C.M.A. 1988).

So long as justice is served by the less drastic remedy, curative instructions are preferred over the grant of a

mistrial. *See United States v. Balagna*, 33 M.J. 54, 56 (C.M.A.1991). After he denied the motion for a mistrial, the military judge stated that his instructions would "take care of any possibility that any of these members might misconstrue trial counsel's argument as a comment on the accused's failure to testify."

IV

Curative Instructions

Even though error was not detected at the trial level, we can nonetheless evaluate the instructions that were given and determine whether they were responsive to the error and cured any harm.

The judge's standard instructions advised the members of the appellant's absolute right to remain silent, of the requirement that they draw no adverse inference from the fact that he had not testified, and of the rule that the exposition of facts by counsel was argument and not evidence. He also tailored the following remarks to the members:

> [Y]ou heard the trial counsel during the course of his argument of the evidence, ask certain rhetorical questions which appeared to be directed toward the accused. . . . I think it was obvious to you that these were [a] rhetorical form of questions and a rhetorical form of argument, but I do caution you again, that the accused has an absolute right to remain silent, and you will not draw any inference adverse to the accused from the fact that he did not testify as a witness.

Absent evidence to the contrary, it is presumed that members comply with instructions. *United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A.1975); *United States v. Mahone*, 14 M.J. 521, 525 (A.F.C.M.R.1982), *pet. denied*, 14 M.J. 454 (C.M.A.1982). Before the members recessed to deliberate, the judge provided them with a written copy

of his instructions. *See United States v. Turner*, 30 M.J. 1183, 1185 (footnote) (A.F.C.M.R.1990). The written instructions did not include the comments quoted above on the trial counsel's use of "rhetorical questions." However, this was not error. Neither the trial nor defense counsel objected to the instructions as given or requested additional instructions, nor did any counsel object to the written instructions that were provided to the members. *See* R.C.M. 920(d).

Certainly, not every error can be made harmless by a trial judge's instructions. *See United States v. Grissom*, 1 M.J. 525, 527 (A.F.C.M.R.1975). We are satisfied in this case, however, that the instructions adequately ameliorated any prejudice caused by the improper comments. Although the judge had not found the argument to be error, he provided a proper and effective curative instruction.

V.

Harmless Error

Since the trial counsel's argument contained some legally inappropriate comments, we must evaluate the resultant harm. The argument improperly highlighted the appellant's failure to testify, a decision that is protected by the Fifth Amendment. When an error of constitutional magnitude has been committed, we can approve a conviction only if we decide that the error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *accord United States v. Brooks*, 25 M.J. 175, 180 (C.M.A.1987).

To find harmless error, we must be satisfied that there was no reasonable possibility the improper comments contributed to the appellant's conviction. *See generally* Annotation, *Violation of Federal Constitutional Rule (Griffin v. California) Prohibiting Adverse Comment by Prosecutor or Court Upon Accused's Failure to Testify, As Constituting Reversible or Harmless Error*, 24 A.L.R.3d 1093 (1969). It is appropriate to assess the improper

argument in the context of the entire trial. *See United States v. Remai*, 19 M.J. 229 (C.M.A.1985) (when constitutional error has been committed but "overwhelming independent evidence of guilt" exists, the case must be tested for prejudice).

The argument here was a subtle, indirect attack on the appellant's failure to testify. Having found the remarks improper, we will follow the approach of *Lent v. Wells*, 861 F.2d 972, 975 (6th Cir.1988), to decide if the error is harmless. The following factors will be analyzed:

> 1) whether the language used was "manifestly intended" as comment on the failure of the appellant to testify or was of such a character that the members would "naturally and necessarily" take it as such;
>
> 2) whether the improper comments were isolated or extensive;
>
> 3) whether evidence of guilt is overwhelming; and
>
> 4) whether curative instructions were given, and when.

Applying those factors, we conclude the errors in argument were harmless. We do not find the trial counsel "manifestly intended" to comment on the appellant's silence; we find another explanation for his remarks equally plausible. *See United States v. Rochan*, 563 F.2d 1246, 1249 (5th Cir.1977). In his zeal to deliver a compelling argument, the trial counsel decided to delve deeply into the "gray zone" of advocacy. He did not deliberately cross the line to impermissible argument. Similarly, we do not believe the members would "naturally and necessarily" construe the argument as a reflection on the appellant's failure to testify. *See United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir.1981). After analyzing the context of the comments and considering the likely effect of the curative instructions, we are satisfied with the members' ability to put the entire argument in a proper perspective.

The argument was quite lengthy, and while improper remarks were made several times, they do not account for a large portion of the total argument presented. *But see* Annotation at 14 A.L.R.3d 723 § 6. Further, counsel's ill-advised choice to defer his objection contributed to the extent of improper argument.

This Court previously decided that the record overwhelmingly establishes the appellant's guilt 28 M.J. at 1032. Upon further review, we maintain that conclusion. Since the appellant's guilt was unequivocally proven, the likelihood of harm from the improper argument is reduced. *See United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); *see generally* Annotation, *Supreme Court's Views as to What Courtroom Statements Made by Prosecuting Attorney During Criminal Trial Violate Due Process or Constitute Denial of Fair Trial*, 40 L.Ed.2d 886, 895 (1974).

We have observed that "[p]rosecutorial improprieties are not reversible error unless they are so gross as to prejudice the accused, and the prejudice is not neutralized by the trial judge." *United States v. Sloan*, 30 M.J. 741, 748 (A.F.C.M.R.1990). Here, the trial counsel's argument included some improper comments, but the military judge tailored an instruction to insure that the members were not unduly influenced. Considering the argument as a whole and evaluating it in the light of the entire record, we are satisfied that the improprieties in the argument were inconsequential.

On initial review, this Court did not find prejudicial error. We now reaffirm that determination. We are persuaded beyond a reasonable doubt that, even in the absence of the improper argument, the appellant would have been convicted. *See Chapman v. California*, 386 U.S. at 23-26, 87 S.Ct. at 827-29; *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). The argument was error, but it was harmless beyond a reasonable doubt.

This decision must not be read as an indorsement of the trial counsel's technique. We explicitly find his comments improper. He needlessly jeopardized an otherwise sound conviction. *See United States v. Hasting*, 461 U.S. at 512, 103 S.Ct. at 1982. It may well be, to paraphrase Shakespeare, that the better part of advocacy is discretion.[2]

VI

Having answered the specified questions of the Court of Military Appeals, the record of trial is returned to that Court in accordance with their instructions. 31 M.J. at 280.

Senior Judge LEONARD and Judge JAMES concur.

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[2] *See* 1 Henry IV, Act V, Scene 4, Line 120.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 63,206
ACM 26528

UNITED STATES,
Appellee,
v.

GERALD I. MOBLEY, Technical Sergeant,
U.S. Air Force,
Appellant.

Argued June 12, 1990.
Decided Sept. 27, 1990.

Opinion of the Court

COX, Judge:

Appellant was tried by a general court-martial with members at Bergstrom Air Force Base, Texas, in August and September 1987. Contrary to his pleas, he was found guilty of attempted rape and premeditated murder, in violation of Articles 80 and 118, Uniform Code of Military Justice, 10 USC §§ 880 and 918, respectively. He was sentenced to life imprisonment, total forfeitures, reduction to E-1, and a dishonorable discharge. The convening authority approved the findings and sentence except for the forfeitures, which he reduced to $300.00 per month for 16 months. After modifying the findings and reassessing portions of the sentence, the Court of Military Review affirmed.[1] 28 MJ 1024 (1989).

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[1] Appellant was convicted of attempted rape and premeditated murder while attempting to commit rape. The Court of Military Review "modified [the] finding of premeditated murder" because

This Court granted review of the following issues:

I

WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ADMITTING EVIDENCE TAKEN FROM THE CRIME SCENE WHICH THE DEFENSE WAS NEVER ABLE TO EXAMINE OR REVIEW AS A RESULT OF THE GOVERNMENT'S ARBITRARY AND UNREASONABLE DECISION TO RELEASE THE CAR AND ITS CONTENTS TO [THE VICTIM'S HUSBAND] ON 25 FEBRUARY 1987.

II

WHETHER THE SPECIFICATION UNDER CHARGE I FAILS TO STATE AN OFFENSE BECAUSE NO CERTAIN OVERT ACT WAS ALLEGED.

"the offense of felony murder in . . . [this] case . . . is embraced within the combined elements of premeditated murder and attempted rape." 28 MJ at 1034. Being "reluctant to dismiss the felony murder language when . . . the evidence . . . has been reviewed . . . and found to be factually and legally sufficient to support a finding of guilty," the court changed the murder specification "by deleting the words, 'and while attempting to perpetrate the offense of rape,' " and stated:

> Having reassessed those portions of the sentence other than confinement, we are convinced that the related punishment elements of dishonorable discharge, forfeiture of all pay and allowances and reduction to airman basic would have been adjudged even if the military judge had dismissed the felony murder language after findings at trial. We conclude that no adjustment of the appellant's sentence is required in light of our action on appeal.
>
> Based on our review of the record . . . , we have concluded that the approved sentence is warranted in this case and that it is not unduly severe.
>
> Accordingly, the findings of guilty, as modified, and sentence are affirmed.

28 MJ at 1034-35.

III

WHETHER THE CLOSING ARGUMENT OF TRIAL COUNSEL WAS IMPROPER IN THAT IT INVITED THE MEMBERS' ATTENTION TO THE FACT THAT APPELLANT DID NOT TESTIFY AND COMMENTED ON THE FAILURE OF THE DEFENSE TO CALL VARIOUS WITNESSES.

IV

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE MEMBERS THAT THEY WERE NOT FREE TO DRAW ANY INFERENCES FROM THE FACT THAT VARIOUS WITNESSES WERE NOT CALLED TO TESTIFY BY THE DEFENSE.

Appellant was convicted of the premeditated murder and attempted rape of Mrs. T, the dependent wife of an Air Force enlisted man. The crime occurred on February 7, 1987, in the parking lot of the Noncommissioned Officers' Open Mess (NCO Club) at Bergstrom AFB. The victim was employed by the club as a cashier and was going home after completing her evening shift. When she did not arrive home within a certain period of time, her husband became worried and left their home to look for her.

At approximately 11:30 p.m. on February 7, 1987, the victim's husband "found her lying" unconscious and bleeding with strangulation marks on her throat, "on the floorboard of the front seat" of her car. The vehicle was still where she had parked it when she arrived at work—"in the last slot of the first row of the NCO Club parking area." She was taken to Brackenridge Hospital in Austin where, despite heroic efforts to save her, she was pronounced dead at 1200 hours on February 9, 1987. The cause of death was "[a]sphyxia due to strangulation (delayed death)."

There were no eyewitnesses to the murder, and appellant did not confess. The Government's case consisted of overwhelming circumstantial physical evidence linking the homicide to him. The initial link in the chain was not made until some 10 days after the murder, by Sergeant Hesskew, a homicide investigator for the Austin, Texas, Police Department. Upon closer examination of the physical evidence, Sergeant Hesskew found a receipt bearing the name "Gerald Mobley." Sergeant Hesskew instituted a personnel check to determine if Mobley was stationed at Bergstrom AFB and learned that he had been assigned to the Noncommissioned Officers' (NCO) Academy at the time of the murder, but had completed his temporary assignment and reutrned to his permanent duty station at George Air Force Base, California.

Sergeant Hesskew and Special Agent Brown of the Air Force Office of Special Investigations (OSI) traveled to George AFB, where they found appellant at his residence. After being properly advised of his rights under Article 31, UCMJ, 10 USC § 831, Mobley denied any involvement in the murder. The officers observed several scratch marks on his face and neck, which he claimed he received while playing basketball at the NCO Academy. However, none of the men with whom he had played ball were able to corroborate his assertion. He could not explain how the receipt bearing his name got into the victim's car. One of his academy classmates testified that appellant had met the victim at the NCO Club and that he had expressed a sexual interest in her on more than one occasion, using caustic street language.

A search of appellant's residence with the consent of his wife revealed a leather jacket with blood smeared on the sleeves. The blood was found to be the same type as the victim's. A shoe print taken from the window of the victim's car matched the sole of one of appellant's shoes. A saliva sample taken from appellant was found to be consistent with the semen found on the victim's dress and

panties, in that both appellant and the murderer had body fluids identified as "non-secretor." (Blood samples taken from appellant were found to be consistent with blood found spattered in the car.) The victim's blood and that of appellant were not of the same type. A pubic hair sample taken from appellant matched pubic hair found in the car. Finally, a piece of paper with a bloody fingerprint was found in the car. The fingerprint positively matched appellant's.

Issue I

The first granted issue concerns the evidence found in the victim's car. At the outset of the investigation, the car was impounded by the Austin police department. While the car was impounded, a forensic expert carefully combed the car for evidence, and numerous photographs were made of the vehicle. On February 25, 1987, without any notice to appellant, the police released the automobile to the victim's husband per his request. No pretrial motions were made to produce the vehicle for defense inspection.

At trial, appellant moved *in limine* to exclude Sergeant Hesskew's testimony regarding any forensic evidence taken from the car, particularly the blood spatterings, because the vehicle was released before any defense investigation of it could be completed.[2] The military judge denied the

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[2] The defense motion to suppress evidence from the victim's automobile requested

> the court to suppress certain evidence offered by the prosecution to wit: Any and all evidence taken from the motor vehicle in which the victim, . . . was found on or about 7 February 1987 to include: one shoe print, pubic hairs, a receipt with the name "Mobley" on it, semen, photographs of the vehicle and blood stains and other evidence from the vehicle, and any other evidence removed from the vehicle, *on the grounds the accused has been denied his constitutional rights to confrontation and for denial of due process for failure by the Government to preserve evidence for analysis for the defense.*

(Emphasis added.)

motion.[3]

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[3] The military judge ruled:

1. The Ruling and Essential Findings . . . on the Defense motion to suppress evidence from the victim's automobile . . . are incorporated herein by reference.

2. The fact that the defense did not examine the victim's auto before it was returned to . . . [her husband] and the fact that each and every spot of blood was not removed from the auto does not provide a basis for excluding Sergeant Hesskew's testimony. As previously found in the referenced Findings, there is no indication whatsoever that apparently favorable evidence material to guilt or relevant to punishment has been withheld, lost, destroyed, overlooked or otherwise not disclosed to the Accused in violation of his constitutionally guaranteed access to evidence. As previously found, while not all the blood stains were removed from the car, representative samples from the areas of the car containing such blood stains were removed. The results of the testing of blood stains are available to the Accused.

3. There is no indication whatsoever that the action of the Austin Police Department in returning the auto to its owner after an exhaustive crime scene examination of the interior was motivated by an intention to circumvent disclosure requirements. It was, rather, done in good faith and in accordance with the department's standard practice.

In pertinent part, "The Ruling and Essential Findings . . . on the Defense motion to suppress evidence from victim's automobile" contains the following findings by the military judge:

* * * * *

4. The victim's husband . . . was the initial suspect but was soon determined not to be a suspect. . . . Accused because the suspect and was interviewed on 17 February 1987. He was ordered into pretrial confinement on 24 February. On 25 February 1987, Captain David Nix, the lead defense counsel, was detailed to represent the Accused. According to Captain Nix, the car was released to . . . [the victim's husband] that same day . . . while he was involved in a trial and thus he had no chance to examine it. None of the defense counsels have examined the car, nor apparently have requested to do so, although the Defense Investigator has had access to the car. The car was released. . . to its owner. . . . There is no evidence that any defense counsel nor any other person ever requested notification before the release of the auto.

5. The release of the vehicle . . . was done in accordance with the standard procedures of the Austin Police Department. Sgt.

The Court of Military Review, concluding that the military judge did not err in his ruling because the vehicle was a "crime scene," stated:

> We know of no rule based upon constitutional, statutory or case law which requires police authorities to preserve a crime scene until appropriate defense representatives have had the opportunity to examine it. Such a rule would be impractical in the extreme, particularly in a case in which theh eventual accused at trial is not identified as a suspect until a considerable period of time has passed following discovery of the crime.

28 MJ at 1028.

We agree. In so ruling, however, we do not indulge in semantics. Although the vehicle most certainly was a "crime scene" as described by the court, it also contained the type of evidence to which an accused should have reasonable access for examination. Art. 46, UCMJ, 10 USC § 846. There were at least five crucial pieces of

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Hesskew . . . [was] aware of no requirement to advise any other persons of the return of a vehicle under such circumstances. No such requirements, as they might exist in any operating procedures, regulations, or statutes were brought to the attention of the court.

6. There is no indication whatsoever that any evidence in the car, either inculpatory or exculpatory, material or otherwise, was lost, overlooked, or not removed, notwithstanding that each and every drop of blood was not removed. . . . There is no indication that any evidence was either selectively removed or left behind to implicate the Accused as he did not become a suspect until the receipt was unfolded and read, approximately one week after the car had been processed for investigation. There is no indication that the car, a crime scene, was processed and investigated in any manner other than a normal and routine manner. All evidece removed from the car has been preserved and is available to the defense for inspection.

7. . . . [No] violation of any Constitutional right of the Accused . . . occurred as a consequence of the return of the vehicle to its owner.

evidence obtained from the forensic inspection of the vehicle, including: two varieties of "blood spatters," *see United States v. Mustafa*, 22 MJ 165 (CMA), *cert. denied*, 479 U.S. 953, 107 S.Ct. 444, 93 L.Ed.2d 392 (1986); human hair samples; semen samples; and a shoe-sole print found on the car window. In turn, expert testimony was offered by the Government concerning each of these crucial pieces of evidence. Indeed, the vehicle itself had evidentiary value. For example, the location of prints and blood spatters gave forensic clues as to how the crime was committed.

Notwithstanding the obvious need that anyone involved in the investigation of this homicide have access to this vehicle, no new "rules of law" need be created to mandate that result or to authorize the police to release a vehicle—or any other evidence. Sufficient tools to resolve the case are already available.

Importantly, at the time the vehicle was released, appellant had been arrested and counsel had been "detailed" to represent him. In other words, there were no compelling circumstances which dictated the immediate release of the vehicle to the victim's husband without at least notifying appellant and his representatives and giving them a reasonable chance to inspect the automobile. *Cf. United States v. Garries*, 22 MJ 288 (CMA), *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed.2d 578 (1986). However, despite the fairness and equity of permitting the defense to have the opportunity to inspect the vehicle, we acknowledge that appellant enjoys no constitutional right to such consideration. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), for these reasons:

First, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58, 109 S.Ct. at 337. This appellant has made no showing of "bad faith."

Second, the defense made no showing that the police suppressed "evidence favorable to an accused" which the Government knew or should have known was "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 88, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). Our review of the record suggests no reasonable theory upon which we could conclude that "evidence favorable to an accused" was destroyed because the car was returned to the victim's husband.

Third, as pointed out by the Court of Military Review, several other factors mitigate against excluding the evidence:

> The police sergeant who made certain deductions based upon his examination of blood spatters patterns was available for cross-examination at trial. *United States v. Garries*, 22 MJ [288] at 292 [CMA 1986]. A number of photographs depicting what the officer had observed were introduced as exhibits at trial. *United States v. Kern*, 22 MJ [49], at 52 [(CMA 1986)]. The physical evidence actually removed from the vehicle and the forensic tests conducted thereon were available to defense representatives during the pretrial and trial process. RCM 703(f)(2) [, Manual for Courts-Martial, United States, 1984].

28 MJ at 1028.

In *United States v. Garries*, 22 MJ at 293, we concluded that "[u]nder Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." Thus, whether this vehicle is characterized as a "crime scene" or as evidence *qua* evidence, Mobley or his representatives should have been afforded a reasonable opportunity to inspect the vehicle before it was released to the victim's husband. To constitute reversible error, however, an accused must suffer some prejudice as a result of the Government's improper conduct. Art. 59(a), UCMJ, 10 USC § 859(a).

We find no prejudice in this record. Furthermore, the vehicle was returned to the victim's husband by Austin city police officials, not by the military police. It is doubtful that those officials would be cognizant of the high standards created by Article 46 of the Uniform Code of Military Justice, and we detect no bad faith on their part in releasing the car as they did. *Arizona v. Youngblood, supra.*

Issue II

Appellant claims for the first time on appeal that the specification which alleges that the accused "did, . . . on or about 7 February 1987, attempt to rape" the victim failed to state an offense because it does not allege an overt act as part of the attempt. At trial, defense counsel did not allege that the specification was defective, but only requested a bill of particulars as to what the Government would prove was the overt act in committing the attempt. Trial counsel merely responded with a list of witnesses and evidence which the Government intended to introduce to prove the attempted rape. The military judge ruled that the information provided to defense counsel adequately informed appellant of what he had to defend against, so he denied appellant's request for a formal bill of particulars.

We reject appellant's claim that the specification fails to state an offense. Military case law has long accepted the pleading of attempts under Article 80, UCMJ, 10 USC § 880, without alleging the overt act. *United States v. Marshall*, 18 USCMA 426, 430-31, 40 CMR 138, 142-43 (1969). Nothing in the Manual for Courts-Martial requires—either implicitly or expressly—that the overt act must be pleaded as part of the specificaiton in an attempt. *But cf.* Art. 81 (conspiracy), UCMJ, 10 USC § 881. *Compare* pars. 4f *with* para. 5f, Part IV, Manual, *supra.*

Although we agree that it may have been better practice to provide appellant with a formal bill of particu-

lars, we are satisfied that he received the functional equivalent. The Discussion following RCM 906(b)(6) states:

> The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial . . . when the specification itself is too vague and indefinite for such purposes.
>
> A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.
>
> A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient.

As previously noted, trial counsel responded to the request by furnishing appellant with a complete list of witnesses and the evidence the Government intended to introduce in the case. This information included proof that the victim's pantyhose and underwear were found pulled down from her waist. In addition, there was evidence of a struggle, and semen and blood consistent with appellant's were found in the car. Moreover, there was a statement by an acquaintance of appellant who had heard him say that he would like to sleep with the victim. Appellant could not have been in doubt as to what overt acts the Government intended to prove. We are satisfied that the judge's failure to order the bill of particulars did not amount to "an error of law . . . [that] materially prejudiced the substantial rights of the accused." Art. 59(a), UCMJ, 10 USC § 859(a).

Issues III & IV

Appellant also claims reversible error because trial counsel's final argument impermissibly commented on appellant's right not to testify or to call witnesses in his

behalf, and because the military judge failed to give adequate curative instructions.[4]

It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Furthermore, he is not permitted to comment on an accused's failure to produce witnesses in his behalf. *United States v. Swoape*, 21 MJ 414 (CMA 1986). If such comments are made, the record must then be examined for prejudice to determine whether the error was harmless. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

With regard to the assertion that the military judge did not provide a curative instruction advising the members that appellant was not obligated to present witnesses in his behalf, we are convinced that trial counsel's comments were sufficiently defused by the military judge upon defense counsel's immediate objection.[5] Apparently,

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[4] During his instructions of the findings, the military judge advised the members:

> *The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness in this case.* The fact that the accused has not testified on any other matter must be disregarded by you. *And, in this regard, you heard the trial counsel during the course of his argument of the evidence, ask certain rhetorical questions which appeared to be directed towards the accused, Sergeant Mobley. I think it was obvious to you that these were [a] rhetorical form of questions and a rhetorical form of argument*, but I do caution you again, that the accused has an absolute right to remain silent, and you will not draw any inference adverse to the accused from the fact that he did not testify as a witness.

(Emphasis added.)

[5] Defense counsel immediately objected, stating that it was "clearly improper argument," although he did not state why it was improper. The military judge sustained the objection, warning trial counsel that he was "arguing questions asked on voir dire" and that he could only argue from the evidence presented at trial. Defense counsel did not ask for a curative instruction.

counsel was satisfied with the military judge's admonition to trial counsel and saw no need for any additional instructions. Absent plain error, that issue was waived. *United States v. Fisher*, 21 MJ 327 (CMA 1986); RCM 920(f).

Trial counsel's comments were described by the military judge as "rhetorical." [6] We find ourselves at a considerable disadvantage to judge this argument because obviously we were not there to observe his demeanor. The cold, written record does not give us a flavor of his tone of voice, his voice inflections, his pauses, or the nuances of his language and its form of presentation. We do know, however, that no timely, contemporaneous objection was made to the presentation.

Nevertheless, the record and the words suggest an image of the accused silently sitting in the courtroom, being bombarded with questions he could not answer, and then listening to answers he could not contest. The practical effect of trial counsel's technique was to do indirectly what he could not do directly; that is, to cross-examine a mute defendant. He would ask the rhetorical question, then imply the answer he hoped to elicit from appellant.

We do not hold that us of the theatrical or oratorical device, the rhetorical question, is *per se* offensive. In many instances, it may well be a very effective method for conveying ideas. If defense counsel had made a contemporaneous objection, we would have expected the military judge to admonish trial counsel to change his strategy.

However, defense counsel represented at trial that he did not object to unfair comments by trial counsel because he was bound not to do so by "AFR 111-1." [7] Ap-

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[6] Excerpts from the record demonstrating the "rhetorical" technique used by trial counsel during closing argument are contained in the appendix.

[7] Defense counsel waited until trial counsel concluded his argument, stating:

parently he was referring to Air Force Regulation 111-1, the Military Justice Guide for the Air Force, which was not discussed in the briefs or oral arguments presented by appellant counsel for either the defense or the Government. Our review of the guide has uncovered no such rule of court, local or otherwise, binding a defense counsel to allow a prosecutor to finish befor objecting to improper argument. *See also* RCM 919(c). Because the issue has not even been raised on appeal, we will assume that appellant no longer claims that AFR 111-1 had a chilling effect upon defense counsel's ability to object to unfair argument.

If a defense counsel is truly concerned that his client is being treated unfairly at trial, that is *not* the time

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> At this point, the defense requests this court grant a mistrial based upon improper argument. *I did not object during Captain Murphy's argument, because of course, the regulation under which we live, AFR 111-1, provides that you should not object during argument. And if my objection were not sustained, I did not want to be in the position of attempting to derail Captain Murphy's argument* in any way. . . . What we had here, were repeated assertions, repeatedly calling attention to the fact that Sergeant Mobley didn't testify by his repeated rhetorical questions to him. His conduct was improper, we therefore now state our objection to trial counsel's closing argument, and move for a mistrial based upon that argument.

(Emphasis added.) The military judge denied the motion, finding, *inter alia*,

> that it was evident the pattern of rhetorical questions were just that, rhetorical in nature only, and obviously, under the circumstances, not asked in a manner which invited attention to the fact that the accused did not testify in his own behalf in this trial.

During rebuttal argument, trial counsel made the following comment:

> But, you remember promises you've been made throughout the course of this trial. If you for instance made a promise during the voir dire section of this trial that you were going to hear a myriad or whole host of witnesses come in here and talk to you about a man's exemplary life, his family life, his military career. . . .

for him to *worry* that he might "derail" the prosecutor's presentation of the case. Rather, it is his obligation, then and there, to "derail" trial counsel's impermissible argument by objecting. It is the military judge's task to decide if the objection somehow unfairly derails a prosecutor's argument. Although the issue was raised before the Court of Military Review as to whether trial counsel's argument amounted to unfair comment on appellant's failure to testify, that court did not specifically address it.

While we are satisfied that appellant is entitled to no relief with regard to Issue I, II, and IV, we are not so comfortable with Issue III. We believe the court below should have the opportunity to deal with that issue before we consider it.

The decision of the United States Air Force Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for submission to that court for specific resolution of the following questions:

> 1. Did trial counsel's argument constitute unfair comment on, or otherwise unfairly exploit, appellant's failure to testify in his own behalf?
>
> 2. Was defense counsel, in fact, precluded from objecting to trial counsel's argument by AFR 111-1, any local rule of practice, Air Force policy or decision of the Air Force Court of Military Review?
>
> 3. If trial counsel's argument was error, did the military judge's instructions cure any harm resulting therefrom?
>
> 4. If trial counsel's argument was error, was it harmless beyond a reasonable doubt?

After action on these questions has been taken, the record of trial shall be returned directly to this Court.

Chief Judge EVERETT concurs.

APPENDIX

Begin to ask yourselves, Sergeant Mobley, why didn't you go back to the NCO club and cash any more checks? You didn't need any more money? No. The NCO Academy lasted for another full week. *Sergeant Mobley, why did you cash but a $15.00 check when you have the evening planned . . .? Were you scared to go back to the NCO club because someone might recognize you? Why had you terminated with extreme prejudice, your interest in the NCO club? We don't know what Cindy did again after that 1900 or so check cashing with Technical Sergeant Mobley until about 10:15.*

* * * * *

There's no way to make death pretty. There's just no way to make things pretty when you find a woman who is left swimming in her own gore. None. But, Sergeant Mobley is now off down the road, he's made a commitment, he's decided that he'll take what Cynthia wouldn't give him, he's decided to shut her up permanently, and now he's inside the car. Now, here Sergeant Mobley, is where I can't figure out what you did next. She's on the seat, unconscious, semi-conscious. . . . *Have you ever been popped right in the face? Have you ever gotten cracked right across the bridge of the nose? Have you ever gotten hit in the temple? Well, Cynthia did on that night. And, Cynthia is stunned, she's bleeding, and gentlemen . . . she is starting to live every woman's nightmare, because at some point in that, she regains enough consciousness to realize what's happening. She's living every women's nightmare, oh, my God, he's trying to rape me.*

* * * * *

Well now, Sergeant Mobley, by this time, you're well down the road, and you realize that you're not going to be able to do it quite so easily. So, you reach out for the closest weapon, and you draw it across her throat. Maybe that will shut her up. But, it doesn't. She's not just manually strangled, there is a crushing strangulation.

You know something else, Sergeant Mobley, what I can't figure out is, how that shoe print got on the window? Was it there when you were trying to mount her, or was it there when you were getting leverage to crush her neck? I don't know. We'll never know. That's one of those things that's going to be an imponderable

* * * * *

What I can't figure out at this point, Sergeant Mobley, is why you didn't rape her. You had her there. She was unconscious. You got her panties off, you got her panty hose down to mid-thigh. Why didn't you rape her? Was it because the scratches hurt? Was it because she urinated on herself? Was it because the blood on her face and the sound of her gagging on her own blood turned you off? I don't know, is there some other reason you couldn't get the job done? I don't know. The point of the matter, members of the court, is, we don't have to prove why he didn't get the job done. It can be any of those reasons. *He got in that car intending to and attempting to rape her. And why it wasn't finished, no one knows.*

* * * * *

So, *what we don't know, another one of those unanswered questions that frankly doesn't need to be answered, is why he didn't rape her, why did he only ejaculate on the floorboard and on her dress?* But, by this time, Sergeant Mobley, things have indeed gone a long, lot further, and you're well down the road, because Cynthia is now struggling against the strap that binds her. It is a desperate struggle, it is one that breaks her fingernails in trying to fend you off, but basically, Sergeant Mobley, by this time, you had her, she was doomed, because by the time you had finished grinding your fist into her throat, Sergeant Mobley, she could never again breathe, she could never again breathe on her own. Now, Sergeant Mobley, let's give you the benefit of the doubt. Let's say for instance, that you really didn't mean to kill her, just to shut her up for a while. *The question that*

naturally arises is, what in the name of God were you thinking that you would be doing to that woman?

* * * * *

But, Sergeant Mobley, what was going through your mind in those one to two to eight minutes? What could you have been thinking of? Were you thinking of your career? Were you thinking of the lie you'd tell if you ever got caught? Or, did you just not care?

* * * * *

Well, *Sergeant Mobley, what doesn't make sense in all that is, if she was letting you do what you wanted to do, why did you go back up north and kill her Why did you go back up her body and put your fingers on that woman's throat, and use your upper body strength to crush the life out of her? If she's consenting to all these things, there's no need to kill her.*

(Emphasis added.) On rebuttal, trial counsel again asked a "rhetorical" question:

> If you were attempted [sic] to buy off on the foolishness that the accused was discovered, then ask yourselves, *Sergeant Mobley, why are you sticking around? Why don't you get out of there? Why are you staying around to be clawed? Why are you staying around to get blood on your jacket? Why don't you leave? And, ask yourselves the most important question, why didn't you tell us about it later?*

(Emphasis added.)

SULLIVAN, Judge (concurring in the result):

I concur in the result, simply stating that I find no prejudicial error in this record. If trial counsel's argument was error, my view is that it would be harmless under Article 59(a), Uniform Code of Military Justice, 10 USC § 859(a). Nevertheless, I am not opposed to my Brother Judge Cox's remand to seek the opinion of the Court of Military Review on this point.

APPENDIX D

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 26528

UNITED STATES

v.

Technical Sergeant GERALD I. MOBLEY,
FR 565-86-1085, United States Air Force

Sentence Adjudged 2 Sept. 1988

Decided 18 July 1989

Before LEWIS, BLOMMERS and KASTL, Appellate Military Judges.

DECISION

LEWIS, Senior Judge:

The appellant pleaded not guilty to attempted rape and premeditated murder committed while attempting to perpetrate the offense of rape. Both murder theories (premeditated and felony murder) were alleged in one specification. He was found guilty following a trial before members. These findings, having been announced as unanimous for murder, subjected the appellant to a possible capital sentence. R.C.M. 1004(a)(2). However, he was sentenced by the members to the mandatory minimum punishment of life imprisonment. Article 118, UCMJ, 10 U.S.C. § 918; MCM, Part IV, paragraph 43e (1) (1984). Other punishment elements were a dishonorable discharge, forfeiture of all pay and allowances and reduction to airman basic. The general court-martial

convening authority approved the sentence with the exception of total forfeitures. The forfeiture was reduced to $300.00 per month for 16 months.

The operative facts, as briefly summarized, reflect that the victim, identified herein as C.T., was the 25 year old dependent wife of an airman first class. She was employed as a cashier at the Noncommissioned Officers' Open Mess, Bergstrom Air Force Base, Texas. Late on the evening of 7 February 1987, she was discovered unconscious, the apparent victim of a beating, sexual assault and strangulation, in the front section of her automobile which was parked in the Open Mess lot. Her body was transported to the base medical facility and, subsequently, to a larger hospital in Austin, the adjacent civilian community. There, C.T. was examined and determined to be "brain dead." The next day, following consultation with her husband and father, medical personnel terminated life support efforts.

A receipt found in the front seat of the automobile contained the appellant's name. While this item was removed from the vehicle the day after the incident by a civilian police detective, it was apparently overlooked for a period of time as other items were being examined. When the significance of the receipt was recognized, agents of the Office of Special Investigations, working in cooperation with Austin City Police detectives, targeted the appellant as a subject of their investigative efforts. The appellant was assigned to George Air Force Base, California, but he had been attending a Noncommissioned Officers' Academy course at Bergstrom when the offense occurred. The appellant was linked to the scene of the offense by circumstantial evidence including the aforementioned receipt, forensic analyses of a seminal fluid stain in the automobile and of pubic hair samples located nearby, the typing and comparison of blood samples found at the crime scene and on clothing belonging to the appellant, the dusty imprint on the car window of the

sole of a shoe similar in design to shoes owned by the appellant, and expert identification of a bloody palm print on a sheet of paper in the deceased's car as matching a known print of the appellant.

We conclude that the evidence produced at trial is legally sufficient to support the findings of guilty returned by the members. Based on our review of the record, we are convinced of the appellant's guilt beyond a reasonable doubt. The appellant has assigned eight errors, several of which have been orally argued by counsel. Three of the assigned errors merit discussion. We affirm with modification of the findings for reasons set forth herein.

Release of Automobile to Victim's Husband

Appellate defense counsel argue that the appellant's right to an equal opportunity to examine evidence, as provided by the Sixth Amendment and Article 46, UCMJ, 10 U.S.C. § 846, was violated when the automobile in which the victim's body was found was released by Austin police to the victim's husband without notice to the defense. The record discloses that the civilian police authorities and agents of the Air Force Office of Special Investigations were coordinating their investigative efforts when custody of the vehicle was relinquished. At trial, the defense moved to suppress all items of evidence obtained from the vehicle as well as testimony based on visual inspections of the vehicle. The motion was denied. This was unquestionably a key issue at trial, inasmuch as the bulk of incriminating evidence against the appellant was located in the vehicle or was derived from evidence located therein.

The essential findings of fact by the military judge are supported by the evidence presented on the motion. Briefly stated, the vehicle was towed from the parking lot adjacent to the Noncommissioned Officers' Open Mess to a police impoundment lot off base. The following day, 8 February 1987, the interior of the vehicle was examined

in great detail, and numerous items of evidentiary value were removed and catalogued. Additionally, various blood splatter patterns were closely scrutinized and measured by a police detective having a good deal of expertise in this type of examination. During the earliest stage of the investigative process the victim's husband was viewed as a possible suspect. However, any suspicion directed toward him quickly dissipated. A little over a week after the vehicle was taken into police custody, the appellant's name surfaced because of the previously mentioned receipt found in the vehicle. Investigators interrogated him at George Air Force Base on 17 February. The appellant became the subject of the investigative effort at this point. He was placed in pretrial confinement at Bergstrom Air Force Base on 24 February and was formally charged on 25 February. The vehicle was released by Austin police authorities to the victim's spouse the same day.

While the record is not entirely clear on the matter of the appellant's representation by counsel, it appears that he consulted military counsel at some point following the 17 February interview. Defense counsel was not detailed until 25 February, the date the vehicle was released. The record clearly establishes that no request was made on the appellant's behalf for an opportunity to inspect the vehicle. On the other hand, it is equally clear that Austin police officials made no attempt to notify the appellant or a representative on his behalf of their intent to release the vehicle to the husband. Testimony presented in opposition to the motion indicated that there was no requirement nor standard procedure that would have required the Austin police to provide such notice.

We shall not engage in a detailed comparison of the circumstances of this case with the leading precedents discussing the Government's obligation to provide evidence, whether apparently exculpatory or not, to the defense. *See Arizona v. Youngblood*, —— U.S. ——, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *California v. Trom-*

betta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed. 2d 578 (1986); *United States v. Kern*, 22 M.J. 49 (C.M.A. 1986); R.C.M. 703(f). Suffice it to say that we can find no evidence of bad faith on the part of the Government, including agents of the Office of Special Investigations who were maintining a close liaison within the Austin police when the vehicle was released to A1C T. *United States v. Kern*, 22 M.J. at 52. Neither can we find any evidence of more than a speculative nature that the vehicle, if examined by representatives of the appellant, would have yielded any evidence of an exculpatory nature. *Ibid.* We conclude that the defense right to examine evidence, as outlined in the cited cases, was not violated by the release of the vehicle to the victim's surviving spouse.

We question whether the victim's vehicle is the type of evidence that is contemplated by the Sixth Amendment and Article 46, UCMJ, in any event. Both the defense, in a written motion to suppress, and the military judge, in rendering his essential findings, characterized the victim's vehicle as the "crime scene." We agree. The vehicle constituted something more than physical evidence removed from the scene of the crime. The vehicle was the crime scene itself. We know of no rule based on constitutional, statutory or case law which requires police authorities to preserve a crime scene until appropriate defense representatives have had the opportunity to examine it. Such a rule would be impractical in the extreme, particularly in a case in which the eventual accused at trial is not identified as a suspect until a considerable period of time has passed following discovery of the crime. Obviously, many crime scenes would be very difficult to secure for lengthy periods if such a rule were adopted.

Based on our analysis we find that the military judge correctly denied the motion to suppress. The appellant

suffered no discernible prejudice from this ruling in any event. The police sergeant who made certain deductions based upon his examination of blood spatter patterns was available for cross-examination at trial. *United States v. Garries*, 22 M.J. at 292. A number of photographs depicting what the officer had observed were introduced as exhibits at trial. *United States v. Kern*, 22 M.J. at 52. The physical evidence actually removed from the vehicle and the forensic tests conducted thereon were available to defense representativs during the pretrial and trial process. *See generally* R.C.M. 703(f)(2). As previously noted, any benefit that might have resulted from a defense examination of the vehicle while it was in police custody is purely speculative.

Introduction of Graphic Photographs of the Victim

We now examine an issue that frequently arises when a victim has been killed or suffered serious bodily injury allegedly as a result of an accused's criminal acts. In prosecuting its case the Government normally has a right to present evidence to the triers of fact of the harm which an accused has caused. As in the case before us, such evidence is often relevant to a material issue, e.g., that the victim, C.T., was killed as the result of intentional violence inflicted against her person. The evidence is often presented, at least in part, in the form of photographs of the injured or deceased person. The military judge in such instance has the task of balancing the extent to which such evidence will assist the triers of fact against the tendency of the evidence unduly to inflame the passions of the triers of fact. Mil.R.Evid. 403.

Case law has historically favored admissibility of photographic evidence, even when its gruesome and graphic nature might upset the sensibilities of jurors. See the extensive citations gathered at Annotations, 73 A.L.R.2d 769 and 53 A.L.R.2d 1102, 1103-1105. The Court of Military Appeals has accorded trial judges broad discretion

in admitting such evidence where the record supports findings that the photographs were offered for a legitimate evidentiary purpose and that their probative value outweighs the risk of unfair prejudice to the accused. *United States v. Yanke*, 23 M.J. 144, 145 (C.M.A.1987); *United States v. White*, 23 M.J. 84, 88 (C.M.A.1986); *United States v. Matthews*, 16 M.J. 354, 363 (C.M.A.1983); *United States v. Harris*, 6 U.S.C.M.A. 736, 21 C.M.R. 58, 66-67 (1956); *United States v. Bartholomew*, 1 U.S.C.M.A. 307, 3 C.M.R. 41, 48 (1952), and cases cited therein. On an infrequent occasion, an appellate court will hold that a military judge abused his discretion in allowing such evidence to be placed before the triers of fact. See *United States v. Coleman*, 36 C.M.R. 574 (A.B.R.1965), *pet. denied*, 36 C.M.R. 541 (1966), where the Army Board of Review held that the military judge abused his discretion in admitting four prosecution photographs of the victim's corpse portrayed with her intestines streaming from the vaginal orifice. The Board concluded that this evidence had a limited probative value in light of other evidence which adequately portrayed the viciousness of the assault which led to the victim's death.

In the case at hand the prosecution offered a number of photographs of the deceased during one of the early Article 39(a), UCMJ, proceedings. The military judge admitted most of the proffered photographs. However, in response to defense objections, he excluded: (a) two autopsy photographs showing right and left side views of the victim's skull with the surgically reflected scalp pulled forward over her face; and (b) a photograph of the surgically exposed neck cavity. These photographs had been offered to depict certain internal injuries she had allegedly received at the hands of the appellant, i.e., deep bruises from blows to the head in the first instance and major hemorrhaging from strangulation in the second instance.

The rejected photographs were proffered again by the prosecution at a later point in the trial. The two photo-

graphs of the victim's exposed skull were grouped into one exhibit along with four drawings depicting clusters of bruises, or contusions, to the victim's head. The photograph of the victim's neck cavity was displayed along with several other photographs including two of C.T.'s excised hyoid bone[1] which, according to expert testimony, was fractured on the left side. In making his initial ruling on the photographs, the military judge had considered a stipulation of expected testimony of a prospective prosecution witness, a forensic pathologist, to the effect that the photographs were necessary to assist in the members' understanding of his testimony. At the later point in the trial, the witness was available and testified in the Article 39(a) session concerning the significance of the proffered photographs. The military judge on this occasion admitted the exhibits over continuing defense objection. We must now consider whether he abused his discretion in doing so.

The military judge, in his ruling admitting the photographic exhibits, found they were relevant both on the merits, as proof that the victim died by strangulation, and in relation to one of the capital sentencing aggravation factors upon which the prosecution relied, i.e., that "the murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim." R.C.M. 1004(c)(7)(I).[2] In admitting the exhibits the military judge asked that the witness explain in his subsequent testimony before the triers of fact "that the dissections involved to produce those photos were not caused by the accused, but were done by a surgeon on post mortem examination." This explanation was subsequently pro-

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[1] The hyoid is located at the base of the tongue.

[2] The record reflects that the prosecution had provided the requisite notice as set forth in R.C.M. 1004(b)(1). See also R.C.M. 1004(b)(5), which raises issues that we need not address in this decision.

vided to the members in compliance with the military judge's request. This was a sound precaution. See the description of the autopsy photographs found to have been erroneously admitted in *People v. Burns*, 109 Cal.App.2d 524, 241 P.2d 308, 318-319 (1952).

A

We first address the exhibit containing the photograph of the opened neck cavity. As previously noted, the military judge based his ruling, in part, on the relevance of the evidence to assist the Government to sustain its burden of proof on the merits. This photograph portrayed what the expert witness characterized as the greatest degree of internal hemorrhaging he had viewed in the course of approximately 1,500 autopsies. The photographic evidence of the hemorrhaging was relevant to demonstrate the likely degree of force utilized in strangling the victim. The witness was able to provide opinions, through the evidence along with other evidence of external abrasions to the victim's neck, as to the possible means by which the strangulation was accomplished.

We are satisfied that this particular exhibit was relevant to the issues of intent and premeditation. Whether it should have been placed before the triers of fact following a Mil.R.Evid. 403 balancing test is a matter about which reasonable people might differ. As appellate defense counsel correctly argue, the photograph in question would have been more helpful to the trier of fact if it had been accompanied by a photograph or other portrayal of the "normal" neck cavity of a cadaver. However, we will not predicate error on the fact that the prosecution might have organized the challenged exhibit in a manner to be of more assistance to the triers of fact than it was. We find that the military judge did not abuse his discretion in admitting the photograph of C.T.'s neck cavity.

B

The admission of the exhibit containing the photographs of the victim's exposed skull presents a more difficult issue. It is necessary that we develop the record in more detail. In rendering findings in support of his ruling on this issue, the military judge stated that the pathologist "has testified that he requires [the photographic exhibit] to show and explain to the jury the force and directions of the blows administered to the head of the victim. . . ." However, this finding is hardly in accord with his actual testimony. During the referenced testimony the witness had been asked by the military judge whether the photographs were necessary to assist him in communicating his opinions and conclusions to the triers of fact. The witness had replied as follows:

> Sir, I am sure I can get across anything that I need to say with words. It is always better from a practical point of view so that there is no question of misunderstanding, to have graphic representation. And if that were at all possible I would certainly want to go that way. I don't personally find a reflected scalp particularly obnoxious or inflammatory. I guess this is a pathologist looking at something quite differently from a lawyer or a judge. I don't know. I can certainly describe what happened, but I think that there is a better chance of complete understanding by all concerned who have to weigh all the facts if this material were allowed. I don't believe it is any different from any other photographs.

Matters went awry shortly after the exhibit containing the photographs of C.T.'s exposed skull was displayed to the triers of fact. While a number of photographs of the victim's remains had been displayed and provided to the members prior to this point in the trial, this was the first exhibit displayed that would likely be viewed as gruesome or grotesque by a sizeable percentage of lay

persons of normal sensitivity. In our view, the graphic nature of the autopsy procedures shown in the two photographs visually overwhelms the depiction of internal trauma to the victim's skull. One of the nine court members fainted during the witness' testimony on the significance of this exhibit. An immediate recess was called. During an Article 39(a) proceeding, evidence was received that the member suffered from a condition which made him susceptible to fainting at the sight of blood or injury. The physician treating the member recommended his excusal from further participation in the trial. All parties agreed, and the member was excused. When the trial resumed the eight remaining members were advised of the excusal, but not of the reason therefor.

In evaluating the members' likely reactions to the exhibit in the context of the issue before us, it might be well to examine certain aspects of the testimony of the expert witness shortly before the excused member fainted. The witness described the surgical procedure involved in reflecting the scalp as being "just as the Indians did, it [the scalp] then could be moved forward or back. In this case, it was moved forward so that the scalp is covering the face." After alluding to an inspection of the brain cavity, which procedure had not been performed at the time the photographs in question were taken, the witness explained: "What we have at autopsy is this head, okay. We still have the same head, and indeed, after the autopsy and this skull cap is put back, you have a very beautiful head."[3] Just before the member fainted the witness was explaining the reaction of a human head to blows striking at it from several directions. He compared the head in such circumstances to a "tetherball."

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[3] Possibly the witness was involved in a well intended attempt to alleviate suspected uneasiness among the members at this point. However, the tone of his testimony could be perceived as a form of ghoulish titillation marked by gross insensitivity toward the victim. Trial advocates may find a lesson to be learned from this incident.

Based on our review of the entire record pertinent to this issue, we find that the military judge abused his discretion in admitting the photographs of the victim's exposed skull. We do not draw a presumption of error from the fact that a member with a peculiar medical condition fained while the exhibit was being displayed and described. However, this incident is a factor which we must evaluate in assessing possible prejudice to the appellant. The military judge erred in admitting the photographs because their probative value was clearly outweighed by the potential for prejudicial impact. The military judge's finding that the expert "required" the photographs was not an accurate representation of the expert's testimony. An examination of that testimony reflects that the expert stopped well short of declaring a requirement to use the photographic evidence to communicate adequately with the triers of fact on the matter of blows to the head of the victim. He, thereby, acknowledged that the photographs *per se* had a limited evidentiary value.

The photographs portrayed the results of trauma that could just as easily have been verbally described and readily comprehended. A distinction can be drawn between these photographs and that of the neck cavity of the victim. Our examination of these exhibits convinces us that it would have been more difficult for the members to have visualized a verbal description of the signs of internal hemorrhaging than internal contusions and bruises from blows to the head. Perhaps, the most striking aspect of the challenged exhibit is that color photographs of the exposed skull sit beside drawings which depict the trauma every bit as accurately. The challenged exhibit is internally cumulative. The photographs add very little, if anything, except the potential for shock value. Based on our review of the record we conclude that the Mil.R.Evid. 403 balance in this instance is struck strongly in favor of exclusion.

In assessing prejudice, we cannot imagine that the eight members felt good about their former associate's fainting at what was probably already a very uncomfortable moment in the proceeding. The question we must ask is whether it is likely that they, or some of them, reacted out of passion and sought to return findings of guilty to vindicate the rights of the victim that they, and their former fellow member, had viewed. The record in this case does not support such an inference. The evidence of the appellant's guilt in this case, while it is circumstantial in nature, is overwhelming. We are satisfied that the error in admitting the photographs was harmless insofar as findings are concerned. We reach the same conclusion with respect to sentence. The appellant received the mandatory minimum sentence relating to confinement. We are convinced that the other adjudged punishments of dishonorable discharge, forfeiture of all pay and allowances and reduction to airman basic were not the product of a zealous overreaction to the gruesome nature of the photographic evidence. Accordingly, we conclude that the appellant suffered no prejudice.

Duplicity/Multiplicity

A

The murder specification alleges that the appellant "did, at Bergstrom AFB, Texas, on or about 7 February 1987, with premediation, and while attempting to perpetrate the offense of rape, murder [C.T.] by means of strangulation." At trial, the defense moved to sever the two parts of what was argued to be a duplicitous specification. R.C.M. 905(b)(5). The military judge denied the motion and ruled that the specification alleged only one offense, murder, although two theories thereof. Article 118(1), (4), UCMJ. *See* R.C.M. 307(c)(3), Discussion (G)(iv).

Appellate government counsel have invited our attention to the excellent brief on the duplicity[4] issue which was

[4] The Manual uses the term, "dupliciousness." R.C.M. 307(c)(3), Discussion (G)(iv). We have also noted that the adjective, "dupli-

submited by trial counsel. On the strength of the authorities cited therein and other authorities revealed in the course of our research, it appears that pleading two theories of murder in one specification is consistent with a well established precedent in civilian and military case law. We conclude that the military judge's ruling was correct.

Article 118, UCMJ, describes four circumstances in which one who kills another may be found guilty of murder. These four means of murder are joined by the disjunctive word, "or." The basic rule which allows for the pleading of more than one statutory means of committing an offense was explained in a Supreme Court opinion construing a counterfeiting indictment:

> The statute was directed against certain defined modes for accomplishing a general object and declared that the doing of either one of several specified things, each having reference to that object, should be punished. . . . We perceive no sound reason why the doing of the prohibited thing in each and all of the prohibited modes may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

Crain v. United States, 162 U.S. 625, 636, 16 S.Ct. 952, 955, 40 L.Ed. 1097, 1100 (1896). It must be noted that the primary holding in *Crain*, which is not pertinent to our consideration and is not discussed herein, was expressly overruled by the Supreme Court in *Garland v. Washington*, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914). However, the *Crain* Court's treatment of the duplicity issue, as set forth in the quoted material, has survived as a recognized rule of construction. *Turner v.*

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cious," has been used in lieu of "duplicitous" on occasion. *See e.g., United States v. Hiatt*, 27 M.J. 818 (A.C.M.R. 1988) ("duplicitous," in headnote 3 to the opinion is actually "duplicious" in the body, 27 M.J. at 820.)

U.S., 396 U.S. 398, 420, 90 S.Ct., 642, 654, 24 L.Ed.2d 610, 625-626 (1970); *United States v. McPherson*, 782 F.2d 66, 68 (6th Cir.1986); *United States v. Olinger*, 759 F.2d 1293, 1301 (7th Cir.1985); *Price v. United States*, 150 F.2d 283, 285 (5th Cir.1945).

This particular duplicity rule was stated in another early case, *Ackley v. U.S.*, 200 F. 217, 221 (8th Cir.1912), as follows:

> Being a statutory crime, the indictment must follow the statute creating the offense. The exception is that, if the statute denounces several things as a crime, the different things thus enumerated in the statute being connected by the disjunctive 'or,' the pleader must connect them by the conjunctive 'and' before evidence can be admitted as to more than the one act. To recite that the defendant did the one thing *or* another makes the indictment bad for uncertainty. To charge the one thing *and* another does not render the indictment bad for duplicity, and a conviction follows if the testimony shows the defendant to be guilty of either the one *or* the other thing charged.

(Emphasis in original). *Accord Bianchi v. United States*, 219 F.2d 182 (8th Cir.1955); *Troutman v. United States*, 100 F.2d 628 (10th Cir.1939); *United States v. Isabella*, 210 F.Supp. 281 (D.Mass.1962); *United States v. Mellor*, 71 F.Supp. 53 (D. Neb. 1946).

Of particular interest is a more recent state case, *State v. Keele*, 644 S.W.2d 435 (Tenn.Cr.App.1982), wherein the Court held that the prosecution might proceed on a count in an indictment which, as the specification in this case, alleged both premeditated and felony murder of the same victim. The Court concluded that the indictment alleged "the commission of one offense—murder." 644 S.W.2d at 439. However, the Court added the following: "The allegation of the manner in which the offense was

committed is in *alternate* terms." *Ibid.* (Emphasis added). This, of course, is not entirely consistent with the Government's pleading theory in the case before us. We shall now consider how the issue of duplicity has been treated by military appellate courts.

The Army Board of Review, in addressing an alleged instructional error, cited *Crain*, *supra*, as authority in concluding: "When a single crime may be committed by several modes or with either of several intents, it is proper to charge in the conjunctive in a single count and a finding of guilty upon proof of any one of the modes supports a conviction. . . ." *United States v. Brooke*, 6 C.M.R. 409, 415 (A.B.R.1952), *pet. denied*, 6 C.M.R. 130 (1952). *Cf. United States v. Branford*, 2 C.M.R. 489 (A.B.R.1951), which adopted the *Crain* rule but concluded that drunken driving and reckless driving under Article 111, UCMJ, 10 U.S.C. § 911, were separate offenses and were, thus, duplicitous when combined in one specification.

The Air Force Board of Review followed the same reasoning set forth in *Crain* and *Brooke* in a series of cases: *United States v. Voudren*, 33 C.M.R. 722, 725 (A.F.B.R. 1963), *pet. denied*, 33 C.M.R. 436 (1963) (a specification alleging certain indecent acts against a child is not duplicitous regardless of whether each individual act in a course of conduct might have constituted a separate offense);[5] *United States v. French*, 25 C.M.R. 851, 866, (A.F.B.R.1958), *aff'd/rev'd in part on other grounds*, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959) (two specifications each alleging multiple acts constituting the accused's plan to sell classified material to foreign representatives were not duplicitous even though each act might have constituted a separate offense); *United States v. Luckey*, 18 C.M.R. 604, 606 (A.F.B.R.1954), *pet. denied*, 18 C.M.R. 333 (1955) (the allegation of two separate, but more or

[5] The current Manual analysis cites *Voudren* as an authority for the R.C.M. 906(b)(5) discussion of what constitutes a duplicitous pleading. MCM, A21-49 (1984).

less simultaneous, threatening acts against a superior does not create a duplicitous specification). See also *United States v. Francis*, 12 C.M.R. 695 (A.F.B.R. 1953), *pet. denied*, 13 C.M.R. 142 (1953), which recognized that a specification alleging criminal acts occurring at divers times is not duplicitous.

The 1969 Manual recited what appears to be a variation of the *Crain* test for duplicitous pleading: "One specification should not allege more than one offense either conjunctively or in the alternative . . . However, if two acts or a series of acts constitute one offense or *if an offense is committed by more than one means, they may be alleged conjunctively.*" MCM 1969 (Rev.), paragraph 28b (emphasis added). The underscored language, which is directly applicable to the situation at hand, does not appear in the relevant discussion portion of the current Manual. R.C.M. 307(c)(3), Discussion (G)(iv). However, it is clear enough to us that setting forth two theories of murder conjunctively in a single specification is permitted by nearly a century of case law supporting this form of pleading. We conclude that the military judge did not err by denying the defense motion to sever the murder specification. We must now consider the related issue of multiplicity.

B

The appellant maintains that the felony murder language is multiplicious for findings with premeditated murder and attempted rape. Appellant cites as authority the Court of Military Appeals' treatment of similar situations in *United States v. Dodson*, 21 M.J. 237 (C.M.A. 1986); *United States v. Teeter*, 16 M.J. 68 (C.M.A.1983), and, more recently, *United States v. Hubbard*, 28 M.J. 27 (C.M.A.1989). In *Dodson* and *Teeter*, the accused had been found guilty, in separate specifications, of premeditated murder and felony murder of the same victim as well as the underlying felony. In each instance the Court dismissed the felony murder specification as fairly em-

braced within and, thus, multiplicious for findings with the other two specifications. *Hubbard* involved a slight variation wherein the accused, although similarly charged, was found guilty of the lesser included offense of unpremeditated murder, felony murder and the related felony. In this instance the Court dismissed the charge and specification alleging unpremeditated murder, inasmuch as a mandatory life sentence was prescribed only for the felony murder. 28 M.J. at 34.

We find the multiplicity issue difficult since the guidance provided by the Court of Military Appeals is not entirely clear to us. In *Teeter*, the Court noted that the homicide elements of felony murder are included within premeditated murder and that the felony elements are included within the separately charged felony. Therefore, felony murder was determined to be multiplicious for findings with the other two offenses. 16 M.J. at 72. In *Dodson*, the Court relied upon its analysis in *Teeter* in dismissing a felony murder specification. The more recent *Hubbard* opinion muddies the water, in our view. There, the Court chose not to apply the *Teeter/Dodson* formulation directly because the accused had been found guilty not of premeditated murder, but of the lesser included offense of unpremeditated murder. Article 118(2), UCMJ. In dismissing the unpremeditated murder specification, the Court cited *Teeter* as standing for the proposition "that, if the same homicide is the subject of findings of premeditated murder and felony murder, one should be set aside." 28 M.J. at 34.

We are confronted with a dilemma. If we were to apply the elements comparison test used in *Teeter* and *Dodson*, we would modify the murder specification by deleting the felony murder language therefrom. However, the message of *Hubbard* appears to be that an accused will stand convicted of the same murder only once at the conclusion of appellate review. It can be argued that the combining of two theories of murder in one specification

achieves the result of only one murder conviction. Therefore, if the *Hubbard* rationale is followed, no alteration of the existing specification is indicated.

While we are unable to reconcile *Hubbard* completely with the two earlier decisions, we believe the better course is to apply the *Teeter* rule as it was stated by the Court when it was formulated. We can discern no valid basis for holding that the Government might avoid the multiplicity consequences of *Teeter* and *Dodson* by combining two theories of murder in one specification as opposed to pleading them separately. In his instructions on findings the military judge quite properly treated the two murder theories as if they were separate offenses. He advised the members that, if they were to find only one of the two, they might do so by an appropriate exception. Therefore, the appellant, as was the accused in *Hubbard*, "is the subject of findings of premeditated murder and felony murder," even though the findings are combined in but one specification. We conclude that the offense of felony murder in the case before us is embraced within the combined elements of premeditated murder and attempted rape.

We are reluctant to dismiss the felony murder language when, as here, the evidence relating to that offense has been reviewed by us and found to be factually and legally sufficient to support a finding of guilty. However, our findings multiplicity determination is based on a construction of law. If we are mistaken in this construction, our action is subject to correction. Article 67(d), UCMJ, 10 U.S.C. § 867(d); *United States v. Johnson*, 23 M.J. 209 (C.M.A.1987). *See United States v. Coleman*, 26 M.J. 407, 409 (C.M.A.1988).

Accordingly, we modify the Specification of Charge II by deleting the words, "and while attempting to perpetrate the offense of rape." The modified finding of premeditated murder carries a mandatory minimum punishment of confinement for life. MCM, Part IV, paragraph 43e(1) (1984). The military judge instructed the mem-

bers that the offenses of attempted rape and felony murder were multiplicious for sentencing purposes. He further instructed the members that they must consider only one offense for sentencing purposes, i.e., murder, without particularization. We appreciate that the military judge was faced with a situation which presented a considerable challenge in terms of formulating properly tailored instructions. Having reassessed those portions of the sentence other than confinement, we are convinced that the related punishment elements of dishonorable discharge, forfeiture of all pay and allowances and reduction to airman basic would have been adjudged even if the military judge had dismissed the felony murder language after findings at trial. We conclude that no adjustment of the appellant's sentence is required in light of our action on appeal.

We should consider the approved sentence, which is identical to that adjudged except for forfeitures, from another aspect. Inasmuch as the appellant's sentence included a mandatory punishment of confinement for life, it is appropriate that we consider whether this sentence is unduly severe. *See United States v. Nelson*, 28 M.J. 553 (A.C.M.R. 1989). Based on our review of the record and in consideration of the totality of the circumstances developed therein, we have concluded that the approved sentence is warranted in this case and that it is not unduly severe.

We have examined the record of trial, the assignment of errors, the Government's reply thereto and the oral arguments of counsel. We have concluded that the findings, as modified, and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. *United States v. Garner*, 28 M.J. 634 (A.F.C.M.R. 1989). *See United States v. Callara*, 21 M.J. 259, 264 (C.M.A. 1986). Accordingly, the findings of guilty, as modified, and sentence are

AFFIRMED.

Senior Judge KASTL concurs.

Judge BLOMMERS

(concurring/dissenting in part):

From my review of the record, I cannot conclude that the military judge's ruling admitting the photographic evidence in question (exhibit depicting the victim's exposed skull) constitutes abuse of discretion. *United States v. Abel*, 469 U.S. 45, 54-55, 105 S.Ct. 465, 470, 83 L.Ed.2d 450 (1984); *United States v. Mukes*, 18 M.J. 358 (C.M.A. 1984); *United States v. Knudson*, 4 U.S. C.M.A. 587, 16 C.M.R. 161, 180 (1954) (Judge Latimer, dissenting). As the majority opinion notes, the military judge in his ruling on this and three other photographic exhibits indicated they would be relevant in establishing one of the sentencing aggravation factors the Government would be required to prove before a capital sentence could be imposed. *See* R.C.M. 1004(c)(7)(I). It appears to me that this was the basis relied upon for admission of the exposed skull exhibit. However, as was the case with the exhibit depicting the victim's neck cavity, the exposed skull exhibit was likewise relevant as to the issues of intent and premeditation. *See United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988). I question whether evidence relevant only to a sentence aggravation factor would be admissible before findings. *See* R.C.M. 1004 (b)(2).

In my view, the principle underlying the *Teeter-Dodson-Hubbard* trilogy is that an accused cannot be convicted twice for the murder of a single person. To do otherwise, the Court in *Teeter* stated, "would leave appellant in the somewhat anomalous position of being convicted of two separate murder charges for one slaying." *United States v. Teeter*, 16 M.J. 68, 72 (C.M.A. 1983). Or, as Chief Judge Everett expressed it in *Hubbard:*

> We have held previously that, if the same homicide is the subject of findings of premeditated murder

> and felony murder, one should be set aside. *United States v. Teeter*, 16 M.J. 68 (CMA 1983). Clearly, that principle applies where, as here, there are *convictions* of unpremeditated murder and felony murder.

United States v. Hubbard, 28 M.J. 27, 34 (C.M.A. 1989) (emphasis added). There is only one murder conviction in this case. We found nothing wrong with the manner in which the Government elected to frame the murder charge. When the ink dries on the final court-martial order, the record should fairly characterize the full extent of the appellant's criminal acts. I would not disturb the approved findings of guilty.

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